No. 93-670-CFX
Status: GRANTED

Title: Albert Howlett, Petitioner
v.
Birkdale Shipping Co., S.A.

Docketed:
October 28, 1993

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Sovel,Charles

Counsel for respondent: Buchholz III,Carl D.

Entry	Date	Note	Proceedings and Orders
1	Oct 28 1993	G	Petition for writ of certiorari filed.
3	Nov 29 1993		Brief of respondent Birkdale Shipping Co., S.A. in opposition filed.
2	Dec 1 1993		DISTRIBUTED. January 7, 1994 (Page 3)
4	Dec 8 1993	X	Reply brief of petitioner filed.
6	Jan 10 1994		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
7	Feb 3 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Third Circuit.
8	Feb 14 1994		Record filed.
		*	Original proceedings United States District Court for the Eastern District of Pennsylvania.
9	Feb 18 1994	G	Motion of National Association of Waterfront Employers for leave to file a brief as amicus curiae filed.
10	Feb 24 1994		Joint appendix filed.
11	Feb 24 1994		Brief of petitioner Albert Howlett filed.
13	Mar 4 1994		CIRCULATED.
12	Mar 7 1994		Motion of National Association of Waterfront Employers for leave to file a brief as amicus curiae GRANTED.
14	Mar 7 1994		SET FOR ARGUMENT WEDNESDAY, APRIL 20, 1994. (2ND CASE).
15	Mar 30 1994	X	Brief amicus curiae of American Institute of Merchant Shipping filed.
16	Mar 30 1994	X	Brief of respondent Birkdale Shipping Co., S.A. filed.
17	Apr 11 1994	X	Reply brief of petitioner Albert Howlett filed.
18	Apr 20 1994		ARGUED.

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93-670

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALBERT HOWLETT,
Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
AND
APPENDIX TO PETITION**

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QUESTIONS PRESENTED

1. Does not the shipowner's duty of care owed to a longshoreman under Section 5(b) of the Longshore and Harbor Workers' Compensation Act extend to unsafe conditions existing in a cargo stow of which the shipowner knows or has reason to know, and which are unknown to the longshoreman and his stevedore employer, are not open and obvious, and would not normally be anticipated?

2. Does not proof of the specific practice of the crew of a ship of observing cargo loading operations give rise to a duty of care with respect to hazardous conditions which such observations would be reasonably expected to disclose?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALBERT HOWLETT,
Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:

Petitioner, Albert Howlett, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered June 30, 1993, affirming the granting of Summary Judgment in favor of respondent in the within proceeding, and the Order of the United States Court of Appeals for the Third Circuit entered July 30, 1993, denying petitioner's

Petition for Rehearing in Banc, and in support thereof represents as follows.

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the decision of the United States District Court for the Eastern District of Pennsylvania is officially reported at 998 F.2d 1003 (3rd Cir. 1993) and is reproduced in the appendix hereto at page 10a.

The Order of the United States Court of Appeals for the Third Circuit denying petitioner's Petition for Rehearing in banc is not officially reported and is reproduced in the appendix hereto at page 12a.

The Opinion of the United States District Court for the Eastern District of Pennsylvania granting Summary Judgment against petitioner is not officially reported and is reproduced in the appendix hereto at page 1a.

The Opinion of the United States District Court for the Eastern District of Pennsylvania denying petitioner's Motion for Rehearing is not officially reported and is reproduced in the appendix hereto at page 7a.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on June 30, 1993. The Order of the United States Court of Appeals for the Third Circuit denying petitioner's Petition for Rehearing in Banc was entered July 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 28 U.S.C. § 905(b).

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies avail able under this chapter.

LEGISLATIVE HISTORY INVOLVED

The legislative history of the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act appears in House Report No. 72-1441, and is reprinted in 1972 U.S. Code Cong. & Adm.News, Vol. 3, beginning at page 4698. The portion relating to the elimination of the unseaworthiness remedy begins at page 4701, and is reproduced in the appendix hereto beginning at page 18a.

STATEMENT OF THE CASE

This case was decided in the court below on a motion for summary judgment. There was evidence in the record to establish the following facts:

Petitioner was injured while working as a longshoreman and engaged in discharging a cargo of cocoa beans from the No. 2 hold of respondent's ship. Petitioner was injured when he stepped down off the cargo, a distance of approximately three feet, to an area of the deck of the ship from which cargo had just been removed. When he stepped down into this space, he slipped and fell suffering severe injury.

The cause of petitioner's slipping and falling was the presence on the deck of a sheet of clear plastic covering the area of the deck from which the cargo had just been removed. It was conceded by the respondent that the sheet of plastic should not have been under the cargo. There also was evidence that petitioner had not been warned of the presence of the plastic, did not see it, and had no reason to anticipate that, in stepping down onto the deck, he would be stepping onto a slippery surface created by the presence of the sheet of smooth plastic on the deck.

There also was evidence to establish that the presence of plastic on the deck underneath the cocoa beans was improper and not a normal condition which longshoremen should be expected to anticipate. On the contrary, it was admitted that the practice was to have paper or wood under the cocoa beans, which, if present, would not present a slippery walking surface.[1]

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1. The area onto which Petitioner stepped was approximately eight feet by eight feet. There was evidence that the plastic was a clear plastic, was dirty and had debris on it. Petitioner testified that he thought he was stepping down onto paper which normally would be placed on a deck under cocoa beans (14A-15A). For this reason, the presence of the plastic on the deck was not "open and obvious" to Petitioner.

The evidence further established that the plastic had to have been placed under the cocoa beans by the loading stevedore in Guayaquil, Ecuador, where the cocoa beans had been loaded aboard the ship. With respect to the placing of the plastic under the cocoa beans, there was evidence that the ship *required* that the loading stevedore place some material on the ship's steel deck under the cargo of cocoa beans to prevent condensation damage, *that this material was supplied to the loading stevedore by the ship,* and normally was wood or paper. However, the ship carried rolls of the type of plastic that was on the deck under the cocoa beans as part of its ship's stores, and, therefore, respondent *admitted* that it had supplied the loading stevedore with the plastic that was under the cocoa beans at the time petitioner was injured.

There also was evidence as to the practice on the ship of the ship's crew to observe cargo loading operations, including testimony that if plastic had been placed under the cocoa beans at the time the cargo was loaded, the crew of the ship would have seen it and would have reported it to the ship's Captain or one of the ship's mates. This testimony came from the Captain of the ship, and was not simply testimony as to any general maritime practice of inspecting cargo operations, but, rather, was testimony as to the specific practice of conducting such inspections on this specific ship.[2]

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2. The Captain testified:

> Q. . . . What is your practice with respect to how many men from the ship's crew are on deck of the vessel watching the loading of cargo when the ship is in Guayaquil?
>
> A. Normally be three sailors and one guard, an officer.
>
> . . . .
>
> Q. And that would start from the beginning -- from the time the longshoremen come on the ship until the longshoremen

Relying on the Third Circuit's decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied.*, 496 U.S. 1007 (1988), which held that a shipowner had no duty of inspection to discover unsafe conditions existing in a cargo stow loaded by a foreign stevedore, the District Court held that the fact that the shipowner in this case had supplied the plastic to the loading stevedore was not sufficient, within the requirements of *Derr*, to establish that the ship had *actual knowledge* that the plastic had been placed under the cocoa beans. On this basis, the District Court granted the shipowner's motion for summary judgment. The Third Circuit affirmed by Judgment Order without filing an opinion.

...Continued...

finish?

A. Yes.

Q. So that if sheets of plastic were being put on the deck for the -- before the cargo -- the cocoa beans were being loaded, they should be able to see that plastic being placed on the deck and stop it?

A. Yes.

. . . .

Q. So that if plastic was placed on the deck under the cocoa beans in Guayaquil in July of 1989, one of the crew members should have seen it?

A. Affirmative. And he would have advised me or one of the ship's mate.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The law in the Third Circuit relating to unsafe conditions existing in a cargo stow, as it has evolved since the decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), not only is in conflict with the law in the Fourth, Fifth and Ninth Circuits, but eviscerates the Congressional intent of encouraging vessel safety by providing longshoremen with a fault based negligence remedy.

As the decision below in the instant case demonstrates, the law in the Third Circuit, as it has evolved since the decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), virtually destroys the longshoreman's negligence remedy because it relieves a shipowner from liability for a hazardous condition which the shipowner is in a position to discover and prevent, but which, at the same time, is unknown to the longshoreman or to his stevedore employer and, because it is unknown to them, is a condition which the longshoreman and his stevedore employer are not in a position to prevent.

In *Derr, supra*, the Third Circuit held that a shipowner had no duty to inspect the manner in which cargo was stowed aboard a vessel by a foreign loading stevedore for purposes of discovering hazardous conditions created in that cargo stow which might endanger a longshoreman subsequently engaged to discharge that cargo. The decision in *Derr*, on which the decision in the instant case is based, was predicated on two erroneous interpretations of this Court's decision in *Scindia Steam Navigation Company v. De Los Santos*, 451 U.S. 156 (1981).

In *Scindia*, this Court, citing Section 41 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.S., § 941, held the primary (although not exclusive) responsibility for providing a longshoreman with a safe place to work rested on his stevedore employer, see *Scindia, supra*, 451 U.S. at 170. The Third Circuit, in *Derr, supra*, erroneously extended this holding to apply to conditions created by a loading stevedore even though that loading stevedore

was *not* the injured longshoreman's employer and not subject to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C., § 901, *et seq.* The principle error in the Third Circuit's decision in *Derr* is that it fails to recognize that there are several significant differences between a hazardous condition created by a stevedore who is not the injured longshoreman's employer and a hazardous condition created during the work being performed by the injured longshoreman's own employer.

First, a loading stevedore, usually foreign, who is not the employer of a discharging longshoreman, owes no duty to that discharging longshoreman to provide him with a safe place to work under § 41 of the Longshore and Harbor Workers' Compensation Act. Therefore, the underlying basis for this Court's decision in *Scindia* -- the presence of the Section 41 duty -- is not present in cases, such as the instant case, involving improper stowage by a foreign loading stevedore.

Secondly, while Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), eliminates the shipowner's indemnity action against a longshoreman's stevedore employer, *see Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), it does *not* preclude a shipowner from seeking indemnity against a stevedore who is *not* the plaintiff's employer, *see Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1304 (9th Cir. 1981). Thus, while a shipowner may not bring a *Ryan Stevedoring* indemnity action against an injured longshoreman's employer, it still may bring an indemnity action against a foreign loading stevedore and, thus, is protected if it should be held liable to an injured longshoreman for a condition created by the loading stevedore, *Turner v. Japan Lines, Ltd.*, *supra*.

Third, while, under *Scindia*, a vessel owner may not have a duty to supervise cargo operations while they are in process, under basic principles of land side law, which are supposed to be applied in developing the longshoremen's

remedy under § 5(b) of the Act,[3] the shipowner would have an obligation to inspect the work of a loading stevedore after it is completed to discover any unsafe conditions which might have been created as a result of that work.[4] Once the loading stevedore's work is completed and accepted by the ship at the loading port, where the shipowner would have the opportunity and ability to discover any hazardous condi-

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3. Congress specifically addressed this point in the Legislative History to the 1972 Act as follows, see House Report No 92-1441, 1972 U.S. Code Cong. and Adm. News at page 4704 (18a):

> Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation -- just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position *vis a vis* his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

4. The applicable provision is set forth in § 412 of the Restatement of Torts, Second, as follows:

> **§412. Failure to Inspect Work of Contractor After Completion**
>
> One who is under a duty to exercise reasonable care to maintain land or chattels in such condition as not to involve unreasonable risk of bodily harm to others and who entrusts the work of repair and maintenance to an independent contractor, is subject to liability for bodily harm caused to them *by his failure to exercise such care as the circumstances may reasonably require him to exercise to ascertain whether the land or chattel is in reasonably safe condition after the contractor's work is completed.* (Emphasis supplied)

tions which may have been created during the loading operation, there simply is no reason to excuse the shipowner from responsibility for the condition of the cargo stow.

The Third Circuit's decision in *Derr*, *supra*, equating the shipowner's responsibility for conditions created by a foreign loading stevedore with the shipowner's responsibility for conditions created during the work being performed by the injured longshoreman's stevedore employer not only is not dictated by this Court's decision in *Scindia*, but undermines the *Scindia* decision which is premised on the ability of the injured longshoreman's employer to prevent accidents. Under the Third Circuit's decision is *Derr*, as the instant case illustrates, the shipowner is relieved from responsibility for a hazardous conditions which are unknown to the injured longshoreman and his employer, while, at the same time, are capable of being discovered and corrected by the shipowner.

A second error in the *Derr* decision is its holding that the shipowner's duty under *Scindia* does not extend to a hazardous condition existing in a cargo stow because a cargo stow is not part of a ship's "work space", see *Derr*, *supra*, 835 F.2d at 495-496. In *Scindia*, *supra*, this Court, citing *Marine Terminal v. Burnside Shipping Co.*, 394 U.S. 404, 415 (1969), held that the shipowner's duty of care extended to the "condition of the ship's gear, equipment, tools and *work space* to be used in the stevedoring operations" (Emphasis supplied). The Third Circuit, in *Derr*, held that, since the foregoing quoted language from the *Scindia* decision did not specifically mention a condition of the ship's cargo, the shipowner had no duty of care with respect to the condition of a cargo stow, *see Derr, supra*, 835 F.2d at 495-496.

The Third Circuit's distinction between a cargo stow and a vessel's work space is an example of the proverbial distinction without a difference. In the context of cargo operations, it is impossible to distinguish between a condition of a cargo stow and a condition of the cargo hold (work space) where that cargo is stowed. Once cargo is stowed in the hold of a vessel, it necessarily becomes part of the

vessel's work space because it becomes the working surface on which the longshoremen must stand to perform their work. As the instant case illustrates, a longshoreman necessarily must stand and walk on cargo and must step off cargo onto the deck of the ship in the course of performing his duties. If something is placed on that deck of a ship on which a longshoreman must walk, such as the sheet of plastic in the instant case, it becomes part of the work space of the ship even though it also is part of the cargo stow. The Third Circuit's distinction between cargo and a "physical" work space of the vessel is simply illogical and unrealistic.

The decision below in the instant case, which is predicated on the *Derr* decision, is in conflict with decisions from at least three other Circuits. It is in conflict with the decision of the Ninth Circuit in *Turner v. Japan Lines, Ltd.*, *supra*, (longshoreman injured as a result of improper shoring of cargo by foreign loading stevedore), a conflict which is recognized in the *Derr* decision itself, see *Derr*, *supra*, 835 F.2d at 494. It is in conflict with the decision of the Fifth Circuit in *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 848-849 (1989), *cert. denied*, 493 U.S. 1050 (1990), which was decided subsequent to *Derr* and specifically rejected *Derr*, (longshoreman injured as a result of improper stowage of pipe by a foreign loading stevedore), and is in conflict with the decision of the Fourth Circuit in *Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070, 1074-1075 (4th Cir. 1982) (longshoreman injured because "manner in which the cargo was stored precluded the stevedore from unloading it by any other means except one which was inherently dangerous").

Since the decision in *Derr*, *supra*, and leading up to the decision in the instant case, there have been numerous decisions in the Eastern District of Pennsylvania in which summary judgment has been entered in favor of shipowners on the basis of the decision in *Derr*. These decisions, for the most part, are not officially reported, and, when appealed, were affirmed by the Third Circuit by Judgment Order and without Opinion. They serve to illustrate how far the Third Circuit has gone in eliminating the longshoremen's negligence remedy.

In *Whitfield v. Craigwin Co., Ltd.*, 727 F.Supp. 183 (E.D.Pa. 1989), a longshoreman was injured when he fell through an improperly constructed wooden framework which had been erected by the foreign loading stevedore in conjunction with the stowage of cargo. Summary Judgment was granted the shipowner on the authority of *Derr*, *supra*, although it is clear that if this case had been brought in the Ninth Circuit, then, under the decision in *Turner v. Japan Lines, Ltd.*, *supra*, the longshoreman would have had a viable cause of action.

Similarly, in *Irby v. Tokai Lines*, Civil Action No. 88-6890 (E.D.Pa., Feb. 23 1990), 1990 U.S. Dist LEXIS 2116, a longshoreman was injured when steel coils on which he was standing collapsed because there was no cargo stowed underneath then. The District Court granted Summary Judgment under the authority of *Derr*. Had this case been brought in the Ninth Circuit, under *Turner v. Japan Lines, Ltd.*, *supra*, the injured longshoreman would have had a viable cause of action.

Similarly, in *Thomas v. Kambara Kisen Co., Ltd.*, Civil Action No. 88-7243 (E.D.Pa., Feb. 12, 1990), 1990 U.S. Dist LEXIS 1440, and *Davis v. Kambara Kisen Co., Ltd.*, Civil Action No. 88-7245 (E.D.Pa., July 31, 1990), 1990 U.S. Dist LEXIS 9898, two longshoremen were injured when steel pipe in a cargo stow gave way because it was improperly secured. The District Court granted Summary Judgment in favor of the shipowner on the authority of *Derr*, *supra*, although in the Ninth Circuit, these cases also would have stated a viable cause of action under *Turner v. Japan Lines*, *supra*.

In *Mullen v. Hoyu Kaiun Kabushiki Kaisha*, Civil Action No. 88-8311 (E.D.Pa., April 26, 1990), 1990 U.S. Dist LEXIS 5045, *affirmed by Judgment Order*, 922 F.2d 832 (3rd Cir. 1990), a longshoreman was injured when he tripped over a lashing wire used to secure cargo to the deck of the ship. It was alleged that this lashing wire had been negligently placed in positioned by a foreign loading stevedore in a manner such that it created a tripping hazard for

longshoremen walking on the ship's deck. Notwithstanding the fact that the lashing wire created a hazard on a "work space" of the ship, *i.e.*, the deck, the District Court granted Summary Judgment on the authority of *Derr* because the lashing wire had been placed in position by the loading stevedore.

In *Somenski v. Companhia de Navegacio Lloyd Brasilerio*, Civil Action No. 90-2737 (E.D.Pa., April 30, 1992), 1992 U.S. Dist LEXIS 6565, *affirmed by Judgment Order*, ___ F.2d ___ (3rd Cir. Oct. 14, 1993), two longshoremen were injured while attempting to discharge pipe which had been loaded aboard a ship in a foreign port in such a manner that the pipe could not be safely discharged. The District Court, on the authority of *Derr*, held that the shipowner had no duty with respect to the manner in which the cargo was stowed even though there was evidence that the ship's captain had inspected the stow in the loading port and was aware of how the cargo was stowed. The *Somenski* case clearly would have been decided differently had it arisen in the Fifth Circuit under the decision in *Woods v. Sammisa Co., Ltd.*, *supra*, with which it was factually similar.

The foregoing decisions have lead inexorably to the decision in the instant case. In the instant case, petitioner was injured when he slipped on a sheet of plastic that had been placed under cargo on the deck of the ship, even though, admittedly, the plastic should not have been put there. The presence of the plastic on the deck was not a condition which the discharging longshoremen had reason to anticipate or expect, as there was evidence that it was the practice to have paper or wood on the deck underneath cargo. Moreover, the plastic could only have been placed on the deck under the cargo at the time the cargo was loaded in the foreign port in Ecuador, and the plastic could only have been placed on the deck by the loading stevedore who necessarily, and admittedly, had to have obtained that plastic from the crew of the ship. Finally, there was evidence that the crew customarily observed the loading operation and would have known about the plastic being placed on the deck under the cargo. In any other Circuit but the

Third Circuit these facts would establish a *prima facie* case of vessel negligence. The extension of the *Derr* decision as the basis for granting summary judgment to the shipowner on this factual situation represents the final step in the Third Circuit's elimination of the longshoremen's negligence remedy contrary to the principles set forth by this Court in *Scindia*, *supra*, and in conflict with the decisions from every other Circuit which has had occasion to consider the issue.

It is abundantly clear from the cases cited herein that a significant number of injuries occur to longshoremen while engaged in discharging cargo as a result of hazardous conditions created by the manner in which the cargo was stowed in the loading port. In many instances, the existence of these hazardous conditions are not readily observable by the injured longshoremen as they are concealed by the cargo itself, and in other instances cargo may be loaded in a manner such that it cannot be discharged with reasonable safety. In either event, the ability of the injured longshoreman or his stevedore employer to do anything about such a condition is limited. Unsafe conditions created by the manner in which cargo is stowed can best, and most easily, be prevented at the time the cargo is loaded. To hold, as the Third Circuit has in *Derr*, that a shipowner bears no responsibility for the manner in which cargo is stowed results in exposing longshoremen to hazards which they can not avoid but which easily could be avoided by reasonable inspections by the ship's crew at the time the cargo is loaded.

It is apparent that the decision in *Derr* will continue to have significant impact on the rights of longshoremen in the Third Circuit who are denied a right of recovery by the decision in *Derr* but would have viable causes of action if they lived or brought suit in any other area of the country. Congress, in the Legislative History which accompanied the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act went out of its way to indicate that the negligence remedy which it was authorizing was to be

uniformly applied in the various ports of the country.[5] The conflict between the Third Circuit decision in *Derr* and the decisions from the Fourth, Fifth and Ninth Circuits in *Gill*, *Woods*, and *Turner*, respectively, demonstrate that this uniformity has not been achieved and will not be achieved until this Court grants certiorari and resolves this conflict. Accordingly, it is respectfully submitted that a Writ of Certiorari should issue to resolve this conflict in circuits.

2. The holding of the Third Circuit that evidence of the practice of the crew of a vessel to observe cargo loading operations does not create a duty of care with respect to conditions which might be reasonably discovered by such observations is in conflict with this court's decision in *Scindia Steam Navigation Company v. De Los Santos*, *supra*.

When this Court, in *Scindia*, held that a shipowner had no "general" duty to inspect or supervise the manner in which an injured longshoreman's stevedore employer performed cargo operations, it also recognized an exception to this general rule of no duty of inspection if there was evidence of "contract provision, positive law, or *custom* to the contrary," see 451 U.S. at 172 (Emphasis supplied).

Notwithstanding this clearly mandated exception to the general rule of no duty to inspect or supervise, the Third Circuit, in *Derr*, *supra*, held that evidence of the "general" practice in the maritime industry for the crew of a vessel to customarily observe the loading of cargo "can not be used

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5.See House Report No 92-1441, 1972 U.S. Code Cong. and Adm. News at page 4705 (24a):

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law.

to reimpose the general duty to supervise the stevedore," see 835 F.2d at 494. Mindful of this holding, petitioner in the instant case offered testimony, not of a "general" custom to observe cargo loading operations, but, rather, of the "specific" practice on this specific ship with respect to observing cargo operations. In this regard, the Captain of the ship was asked, and testified, that it was the practice on the ship to have an officer and three seamen assigned to watch the cargo loading operation, and that if sheets of plastic had been placed on the deck during the loading operation, these crew members would have observed it being done and would have reported it to him or one of the ship's mates.[6]

Under Rule 406 of the Federal Rules of Evidence, this testimony by the ship's Captain was sufficient to establish that such observations were in fact conducted at the time the specific cargo involved in this case was loaded aboard the ship in Ecuador.[7] Thus, this evidence was sufficient, for purposes of opposing a motion for summary judgment, to establish that the crew of the vessel knew or had reason to know that plastic had been placed under the cargo at the time the cargo was loaded. Despite this, however, the District Court, affirmed by the Third Circuit, applied the *Derr* holding that the shipowner owed no duty of care to petitioner with respect to the manner in which the cargo was stowed.

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6. The testimony of the ship's Captain on this point is set forth in Footnote 2, *supra* at page 5.

7. Rule 406 of the Federal Rules of Evidence provides:

> **Rule 406. Habit; Routine Practice**
>
> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Whether or not proof of a "general" maritime practice of the crews of ships to observe cargo loading operations is sufficient to impose a duty of care on a shipowner with respect to cargo loading operations, proof of a "specific" custom or practice on a specific ship to observe cargo operations, coupled with proof of what those observations would be expected to disclose, as was presented in the instant case, clearly should be enough under this Court's decision in *Scindia* to establish the existence of a duty of care as to conditions which such observations might reasonably be expected to disclose. The failure of the Third Circuit to distinguish between evidence of a "general" practice with respect to making observations and the "specific" practice on a particular ship with respect to observing cargo operations is but another example of the Third Circuit's interpretation of *Scindia* in such a manner as to simply eliminate the longshoremen's negligence remedy. Because the decision below is so clearly in conflict with this Court's decision in *Scindia*, it is submitted that a Writ of Certiorari should issue to clarify what evidence is necessary to establish the existence of a "contract provision, positive law, or custom to the contrary" as that terminology is used in the *Scindia* decision.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the Judgment below.

Respectfully submitted,

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Philadelphia, PA 19106
(215) 931-2500
Attorneys for Petitioner

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT, Plaintiff,	:	CIVIL ACTION
v.	:	
BIRKDALE SHIPPING CO., S.A.,	:	
Defendant.	:	NO. 91-7978

MEMORANDUM

J. M. Kelly, J. **OCTOBER ,1992**

Presently before this court is Defendant Birkdale Shipping Co.'s motion for summary judgment pursuant to Fed. R. Civ. P. 56. This court has jurisdiction over this matter under 28 U.S.C. § 1331 and § 1332.

This action arises out of the injury to Plaintiff, Albert Howlett, while discharging pre-slung cocoa beans from the No. 2 hold of the vessel M/V Presidente Ibanez. At the time of the incident the M/V Presidente Ibanez was owned and operated by Birkdale Shipping Co., S.A.[1] Plaintiff was employed as a longshoreman by Northern Shipping Co., a stevedore operating in the Port of Philadelphia.

The alleged accident is said to have occurred on July 28, 1989. In the hours before the accident, Plaintiff and other longshoremen were working in the tween deck of the No. 2 hatch hooking up four or five drafts of pre-slung bags of cocoa beans. While the first draft of cocoa beans were

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1. The operator of this vessel on the date of the alleged injury is in dispute. This court will not deal with this issue for purposes of this motion.

being lifted out of the hatch, plaintiff allegedly stepped down to the deck, upon which he allegedly slipped and fell.

Plaintiff contends that covering the deck was a layer of plastic. Plaintiff claims that he was not aware of the plastic and believed the deck to be covered by paper. It is customary to place paper and/or plywood under cocoa beans to protect against condensation. It is not customary to use plastic as a substitute for this purpose. Plaintiff asserts that the defendant was negligent in providing the stevedore with plastic instead of the usual paper or wood and in neglecting to warn the longshoremen that plastic was being used to protect the beans from condensation.

Defendants move for summary judgment claiming that as a matter of law they owed no duty of care to plaintiff. Defendants allege that the Longshoremen's and Harbour Worker's Compensation Act, 33 U.S.C. § 905(b), as amended in 1972, limits a shipowner's liability to acts of its own negligence and cannot be held liable for dangerous conditions arising from the acts of an independent stevedore.

Defendants claim that under Scindia Steam Navigation Ltd. v. De Los Santos 451 U.S. 156 (1981) and Derr v. Kawasaki Kisen, K.K., 835 F.2d 490 (3d Cir. 1987) a vessel owner owes no duty in supervising the work of a stevedore, nor can he be held liable for such parties acts of negligence. Furthermore, Defendant points out that while they were the source of the plastic they were not responsible for, nor were they aware, of its intended use. They also claim that even if they were aware of the plastics intended use, this is not enough to impose liability. In order to be liable the shipowner would have to perform an act creating "an unreasonable risk of harm." Woods v. Partenreederei Ms. Yankee Clipper, 677 F. Supp. 46, 48 (D. Mass 1987). Defendant also asserts that regardless of their knowledge involving the use of the plastic, they were under no duty to warn as the condition was open and obvious.

In response Plaintiff asserts that there is sufficient evidence that Defendant had actual knowledge that the plastic was to be used in connection with the cocoa beans and that the condition was not "open and obvious", and therefore may be held liable.

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255.

While the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Therefore, the party opposing the motion must come forward with "more than a mere scintilla of evidence in its favor" and "'cannot simply reassert factually unsupported allegations contained in its pleading.'" William v. Borough of West Chester, 891 F. 2d 458, 460 (3d Cir. 1989) (citing Anderson, 477 U.S. at 249 and 323).

The Longshoremen's and Harbour Worker's Compensation Act, 33 U.S.C. § 901 et seq. defines the duty owed to longshoremen by vessels. The 1972 amendments to the Act reduced the liability of the shipowner and increased the opportunity to recover from the stevedore. Under the amendments, the shipowner could be held liable for his own

negligence, but not the negligence of the stevedore. 33 U.S.C. § 905(b); Woods, 677 F. Supp. at 47.

Scindia, the leading case on the duty a shipowner owes to its stevedore, held that the "vessel owes the longshoremen a duty to exercise due care 'under the circumstances'." Woods at 47. This level of care requires the vessel to be in working order so that an experienced stevedore is able to safely perform cargo operations. Id.

In this case Plaintiff is claiming that Defendant breached the duty to warn. In order to satisfy this claim it is necessary for plaintiff to show that defendant had actual knowledge of the condition and that it was not open and obvious.

Plaintiff asserts no factual basis for the claim that the vessel had actual knowledge that the plastic was being used in stowage for the cocoa beans. Plaintiff infers knowledge since the vessel was the source of the plastic. This assertion does not satisfy the standard of actual knowledge necessary to impose a breach of liability. As Defendant denotes, being the supplier of equipment does not necessarily imply knowledge of its intended purpose.

Secondly, Plaintiff asserts that Defendants knowledge can be found through the fact that Defendants crew were present during the loading of the cocoa beans. This assertion also does not satisfy the knowledge requirement. If it is true that the dangerous condition was apparent from the mere presence during the loading process, then it readily transpires that this was an open and obvious condition. Under Scindia, a shipowner is not liable for open and obvious conditions.

Plaintiffs have produced no evidence from which to find a genuine question of fact. Therefore, Defendant's Motion for Summary Judgment shall be GRANTED.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT, Plaintiff,	CIVIL ACTION
v.	
BIRKDALE SHIPPING CO., S.A., Defendant.	NO. 91-7978

ORDER

AND NOW, this 1st day of October, 1992, in consideration of Defendant's Motion for Summary Judgment, Plaintiff's Answer thereto, Defendant's Reply, as well as the foregoing Memorandum of Law, it is hereby ORDERED that Defendant's Motion for Summary Judgment is GRANTED.

BY THE COURT:

/s/ James McGirr Kelly
James McGirr Kelly, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT, Plaintiff, v. BIRKDALE SHIPPING CO., S.A., Defendant.	CIVIL ACTION NO. 91-7978

ORDER

Before the Honorable James McGirr Kelly

AND NOW, this 1st day of October, 1992, in accordance with the Court's Order of October 1, 1992,

IT IS ORDERED that judgment be and the same is hereby entered in favor of defendant Birkdale Shipping Co., S.A. and against plaintiff Albert Howlett.

BY THE COURT

ATTEST: /s/ Arlene L. Quinn
Arlene L. Quinn
Deputy Clerk

Civ 1 (8/80)

ENTERED: 10/2/92

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT, Plaintiff, v. BIRKDALE SHIPPING CO., S.A., Defendant.	CIVIL ACTION NO. 91-7978

MEMORANDUM

J. M. Kelly, J.

Presently before the court is Plaintiff Howlett's Motion for Reargument of the court's Order, dated October 1, 1992, granting Defendant Birkdale Shipping Company's Motion for Summary Judgment. For the following reasons, the motion will be denied.

Plaintiff filed a complaint against Empresa Maritima Howlett v. Empresa Maritima, 92cv4245, on July 22, 1992. This complaint was based on the same facts and circumstances as the present action. On November 10, 1992, an Order was issued by this court to consolidate the cases for all purposes.

Plaintiff Howlett does not specify what rule of Federal Civil Procedure or Local Rule of the United States District Court for the Eastern District of Pennsylvania he invokes for her motion. Nonetheless, "any kind of motion that draws into question the correctness of the district court judgment is considered to be a motion to alter or amend the judgment under Civil Rule 59(e)." 16 Charles A. Wright & Kenneth A. Graham, Jr., Federal Practice and Procedure § 3950, at 364 n.7. The purpose of a motion for reconsideration is to correct errors of law or fact, or to present newly discovered evidence. Keene Corp. v. International Fidelity Insurance Co., 561 F.Supp. 656, 665 (N.D. Ill. 1983),

aff'd, 735, F.2d 1367 (7th Cir. Ill., May 29, 1984) (No. 83-1492).

An order granting summary judgment was issued on October 1, 1992. The court found that actual knowledge could not be imputed to the vessel owner and that the accident occurred as the result of an open and obvious condition.

In support of the instant motion, Plaintiff asserts that there has been a misapplication of the law to the facts of the case. Plaintiff contests the courts' finding the condition to be open and obvious, as well as, the failure to impute actual knowledge on the vessel owner.

Plaintiff submits no new evidence in support of this motion. Additional law has been found to supports the courts findings in the original memorandum and order. See Trinidad Pimental v. Canadian Pacific Bulk Ship Service and M/V Fort Nanaimo, CV NO. G-89-162, (S.D. Tx. filed July 19, 1991). Finding the law to have been appropriately applied to the facts of the case, Plaintiff's motion for reargument shall be denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT, Plaintiff, v. BIRKDALE SHIPPING CO., S.A., Defendant.	CIVIL ACTION NO. 91-7978

ORDER

AND NOW, this 23rd day of November, 1992, in consideration of Plaintiff's Motion for Reargument, Defendant's Reply, Plaintiff's Response, thereto, Defendant's Supplemental Brief, as well as the foregoing Memorandum of Law, it is hereby ORDERED that Plaintiff's Motion for Reargument is DENIED.

BY THE COURT:

James McGirr Kelly
James McGirr Kelly, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-2943

ALBERT HOWLETT

V.

BIRKDALE SHIPPING CO., S.A.
(D.C. Civil No. 91-07978)

ALBERT HOWLETT

V.

EMPRESA MARITIMA DEL ESTADO
(D.C. Civil No. 91-04245)

Albert Howlett,
Appellant

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action Nos. 91-07978 & 91-04245)
District Judge: Honorable James McGirr Kelly

Argued June 21, 1993

BEFORE: STAPLETON, MANSMANN and
HUTCHINSON,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court dated November 24, 1992, be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/S/ Walter K. Stapleton
Circuit Judge

ATTEST:

/S/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: June 30, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-2943

ALBERT HOWLETT

V.

BIRKDALE SHIPPING CO., S.A.
(D.C. Civil No. 91-07978)

ALBERT HOWLETT

V.

EMPRESA MARITIMA DEL ESTADO
(D.C. Civil No. 91-04245)

Albert Howlett,
Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS,
Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/S/ Walter K. Stapleton
Circuit Judge

Dated: July 30, 1993

Excerpt from testimony of Albert Howlett

Q. Before you stepped down from the cocoa beans to the plastic, were you aware that there was plastic there?

A. No.

Q. When you stepped down from the cocoa beans to the plastic, where were your eyes directed?

A. Where were my eyes directed?

On the draft.

Q. Did you look down at all before you stepped down into --

A. Yes. As I was coming down, yes.

Q. Did you look down to the skin at any point before you stepped down into that empty space?

A. Back that up please.

Q. Before you stepped from the cocoa beans down into the space where this draft had been located, at any time did you direct your eyes to what would have been normally the skin?

A. Yes.

Q. When you did that, did you observe the plastic?

A. No.

Q. Why did you not see the plastic?

A. Well, it was dirty. I guess I really didn't think it was plastic. I really didn't think it was plastic.

Q. What did you think it was?

A. I thought it was paper.

Q. I don't think I've got a full appreciation of what the plastic looked like. You said it was dirty. Can you describe it any better than that?

A. It was dirty and there was debris on it, you know.

Q. Was it clear plastic or was it a dark plastic?

A. I guess a dirty piece of plastic. I guess clear. I guess clear.

Q. When you say "dirty." What --

A. From the cocoa beans, just the dirt.

Q. Was there dust on it or was it just dirt?

A. Yes, it was dust, dirt, cocoa beans, you know, the whole bit.

Q. Was it dirty in one area or the entire thing?

A. It was dirty all over.

Excerpt from testimony of
Captain Daniel Cafena Campos

Q. In stowing cocoa bean, was it the practice on the IBANEZ to always use paper on the deck?

A. First wood and then paper.

Q. Why wood and then paper?

A. So the paper would have a better resistance. If not, it would break.

. . . .

Q. . . . . What is your practice with respect to how many men from the ship's crew are on deck of the vessel watching the loading of cargo when the ship is in Guayaquil?

A. Normally be three sailors and one guard, an officer.

. . . .

Q. So that it would be fair to say -- strike that. You have three men, three seamen and a mate, an officer -- you have three seamen and an officer assigned to watch the four cargo holds?

. . . .

A. Yes. Because many strangers or strange people could enter. There would be people who were trying to stow away drugs or stowaways.

Q. And those men will move from hold to hold during the course of the whole cargo operation watching what is happening?

A. Affirmative. Yes.

Q. And that would start from the beginning -- from the time

the longshoremen come on the ship until the longshoremen finish?

A. Yes.

Q. So that if sheets of plastic were being put on the deck for the -- before the cargo -- the cocoa beans were being loaded, they should be able to see that plastic being placed on the deck and stop it?

A. Yes.

. . . .

Q. Let me rephrase the question. When the ship was in Guayaquil in July of 1989, whatever the date, would the practice that you just described have been the practice that was followed on the ship?

A. Please remind me. What practice are you referring to?

Q. The practice of having the crew members watch the loading and to watch to see what was placed on the deck.

A. The practice is this. To take care of the cargo and to make sure that no strange people come on the ship. Strangers.

Q. Would that have been the practice, to watch the cargo being loaded on the ship in Guayaquil, in July of 1989?

. . . .

A. Yes.

Q. So that if plastic was placed on the deck under the cocoa beans in Guayaquil in July of 1989, one of the crew members should have seen it?

A. Affirmative. And he would have advised me or one of the ship's mates.

LONGSHORE'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

HOUSE REPORT NO. 92-1441

(as reported at 1972 U.S. Code Cong. and Adm. News beginning at page 4698)

* * *

[4701]

Elimination of Unseaworthiness Remedy

One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of vessels, as third parties, to pay damages to long-

[4702]

shoremen who are injured while engaged in stevedoring operations. The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with *Seas Shipping Co. v. Sieracki*, 328 U.S. 25 (1946) which held that the traditional

seamen's remedy based on the breach of the vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under the *Sieracki* case, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of "unseaworthy" conditions even though the unseaworthiness was caused, created, or brought into play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it. Furthermore, in the example given above, under the Supreme Court's decision in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.

The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were not being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in

such cases. The Committee also heard testimony

[4703]

that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committee's attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

The Committee also has taken note of the inescapable fact that the controversy over third party claims by longshoremen has had political ramifications which have resulted in forestalling any improvements in the present Act for over twelve years.

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act, *Crumedy v. The J. H. Fisser*, 358 U.S. 423, *Albanese v. Matts*, 382 U.S. 283, *Skibinski v. Waterman SS Corp.*, 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, *A. N. G. Stevedores v. Ellerman Lines*, 369 U.S. 355, *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska SS Co. v. Peterson*, 347 U.S. 396, *Italia*

[4704]

Stevedoring Co., 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence.

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the

vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation -- just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position *vis a vis* his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.

[4705]

Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages.

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yuka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship build-

ing or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption to risk" in an action by an injured employee shall also be applicable.

Finally, the Committee wishes to emphasize that nothing in this bill is intended to relieve any vessels or any other persons from their obligations and duties under the Occupational Safety and Health Act of 1970. The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupational health and safety.

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No. 93-670

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALBERT HOWLETT,

Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

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October Term, 1993

ALBERT HOWLETT,

Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The Petition accurately states that Petitioner Albert Howlett, a longshoreman, slipped and fell while assisting with the discharge of cocoa beans from the No. 2 hold of the M/V PRESIDENTE IBANEZ, a vessel owned by the Respondent.[1] The Petition also accurately states

1. Petitioner filed two lawsuits, one against Respondent Birkdale Shipping Co., S.A. and one against the demise charterer of the vessel, EMPRESA MARITIMA DEL ESTADO. These lawsuits were consolidated at the district court level and the appeal to the Third Circuit was pursued against both defendants. (10a, 12a). It appears, however, that Petitioner has filed this Petition for Writ of Certiorari only against Birkdale Shipping Co., S.A., who admitted ownership of the vessel, but denied that it was in possession of the

that this accident occurred while the Petitioner was stepping down from cargo in the hold to an exposed area of the deck; the exposed area was covered with a sheet of plastic; the plastic had been placed on the deck by a foreign, loading stevedore; and the plastic was obtained by the loading stevedore from the vessel. The Petition, however, also contains several mischaracterizations of the evidence and omits several important facts.

First and foremost, there is absolutely no evidence to support a finding that the vessel's crew knew, or had reason to know, that plastic had been placed on the deck under the cocoa beans. Contrary to what is implied in the Petition, there is no evidence that the vessel's crew provided plastic to the loading stevedore *for the purpose of using it as a separation material.* In fact, the ship's Captain, Daniel Cafena, testified that he has never seen plastic used as a separation material for cocoa beans and would not have permitted it to be used for this purpose without registering a complaint since plastic can cause condensation damage to this type of cargo. (1b-7b). In addition, Captain Cafena testified that if any member of his crew saw plastic being used for this purpose, it would have been reported it to him and he would have asked the loading stevedore to remove it immediately. *Id.*

Respondent has never disputed that the plastic came from the vessel's supplies since the vessel made available all of the materials needed for stowing cargo, i.e., paper, plywood, dunnage and plastic. (3b). There is no evidence in this case, however, that the vessel knew what the loading stevedore intended to do with the plastic. Plastic can be used for a myriad of purposes in connection with the loading of cargo aboard a vessel.

NOTES *(Continued)*
vessel at the time of Petitioner's alleged accident. Since the duties Petitioner seeks to impose would only apply to the entity in possession of the vessel (i.e. EMPRESA MARITIMA DEL ESTADO) this is another reason why this Petition should be denied. *See Bjarunson v. Botelho Shipping Corp.*, 873 F.2d 1204 (9th Cir. 1989).

Furthermore, there is no evidence that plastic was used as a separation material in any other hold, or on any other deck, other than the immediate deck area where Petitioner allegedly fell. (8b-9b).

In addition, the Petition mischaracterizes the testimony of Captain Cafena regarding the duties of the crewmembers who were on deck during the loading operation. Contrary to what is stated in the Petition, Captain Cafena did not testify that "if plastic had been placed under the cocoa beans at the time cargo was loaded, the crew of the ship *would* have seen it." *See* Petition at p. 5. Instead, Captain Cafena merely speculated that if plastic was used for this purpose, the crewmembers "*should* have" observed it. (16a). Petitioner did not offer any evidence to support a finding that a crewmember *did observe* plastic being placed on the deck. As noted, the testimony of Captain Cafena actually established that if a crewmember had observed plastic being used for this purpose, it would have been reported to him. (3b, 5-6b). Also, as noted, by stating that a crewmember "should have" seen it, Captain Cafena was not speaking in terms of legal duties, but in terms of visual observations. Petitioner fails to point out that Captain Cafena also testified that the vessel's Chief Mate, who was on the deck during the loading operation, "can't be attentive to everything that is happening." (1b). In addition, on page 5 of the Petition, Petitioner states that the crew conducted "inspections," implying that the crew supervised or inspected the work of the loading stevedore. This is simply not what the evidence established. Captain Cafena testified that the crewmembers on deck were watching the cargo, watching for stowaways, watching for people stealing cargo or attempting to smuggle drugs, and generally "protecting the ship." (2b-3b, 5b). There is absolutely no evidence to support a finding that any crewmember inspected, supervised, or reviewed the work of the longshoremen working in the holds.

In addition, contrary to what is stated in the Petition, Captain Cafena did not "require" the stevedore to place a separation material under the cocoa beans. This was simply the standard practice and Captain Cafena specifically testified that the decision of whether to use wood, paper, or any other separation material, was made by the stevedore. (1b, 3-4b, 6b).

The Petition is also misleading to the extent it implies that the Respondent vessel owner knew, or should have known, that placing plastic on the deck would present a safety hazard for the discharging stevedore. There is no evidence to support this assertion. Captain Cafena did testify, as Petitioner asserts, that plastic "should not have been under the cargo." *See* Petition at p. 4. Captain Cafena, however, stated that using plastic as a separation material was improper because, and only because, it could cause damage to the cocoa beans. (6b). There is no evidence to suggest that Captain Cafena had any reason to believe that placing plastic on the deck would create a dangerous condition for the longshoremen in the discharging port. Curiously, even the Petitioner failed to offer evidence to show that placing plastic under cargo on the deck of a hold would create an unreasonable risk of harm for experienced longshoremen.

Finally, Petitioner asserts that the "dangerous condition" in question, the plastic on the deck, was not a condition that a longshoreman "should be able to anticipate." *See* Petition at p. 9. This is simply not true. When the draft of cocoa beans was lifted out of the hold immediately before the alleged accident, it exposed an area that was approximately eight foot square. *See* Petition at p. 9, n.1. The Petitioner testified that this entire area was covered by plastic. In addition, Joseph Fisher, an eyewitness to the accident, testified that he could see the plastic when he looked down at the exposed area. (8b). Furthermore, Raymond McMullen, another longshoreman, testified that he could see the plastic all the way from the top deck of the vessel. (9b).

Therefore, the district court properly held that this was a condition that could have been, and should have been, discovered by a reasonable inspection of the hold by a competent stevedore, i.e. if the Petitioner looked where he was stepping, the condition was open and obvious. (4a, 8a). This holding provided a second, independent basis for granting Respondent's Summary Judgment Motion.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Respondent Concurs That There Is A Conflict Between The Third, Fifth And Ninth Circuit Courts of Appeals Regarding A Shipowner's Liability For Improperly Stowed Cargo; However, The Present Case Does Not Properly Present This Conflict For Review.

The Petition accurately states that the district court granted summary judgment in the present case, and the Court of Appeals affirmed, based upon the holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988). The Petition also accurately states that the decision in *Derr* is in conflict with the decision handed down by the Fifth Circuit Court of Appeals in *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 853 (1990), and the decision handed down by the Ninth Circuit Court of Appeals in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982).[2] Furthermore, the Petition accurately states that the negligence remedy provided under §5(b) of the Longshore and Harbor Workers' Compensation Act,

2. In *Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070 (4th Cir. 1982), the Court of Appeals for the Fourth Circuit did not consider or adopt the distinction Petitioner seeks to establish between a vessel owner's duty to supervise domestic and foreign stevedores. In addition, Petitioner fails to note that the Second Circuit Court of Appeals has issued an opinion consistent with the holding in *Derr*. *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977).

insofar as it relates to a shipowner's responsibility for the condition of cargo stowed by an independent stevedoring contractor, is not being interpreted and/or applied uniformly throughout the country, contrary to the express intent of Congress. The present case, however, does not properly present this conflict for review because, even under the standards of care adopted in the Fifth and Ninth Circuits, summary judgment was properly granted.

A. The Third Circuit's Holding In *Derr*, As Well As The Decisions Of The Lower Court And Third Circuit In The Instant Case, Are In Complete Accord With The 1972 Amendments To The Longshore And Harbor Workers' Compensation Act And This Court's Decision in *Scindia*.

1. A Vessel Owner Does Not Have A Duty To Supervise The Loading Operation Of A Stevedore, Whether Foreign Or Domestic.

In *Derr*, the Third Circuit Court of Appeals held that a vessel owner does not have a duty to supervise or inspect the loading operation of an independent stevedore, whether foreign or domestic. In addition, the Court held that a vessel owner does not have a duty to inspect the condition of the cargo in the holds before turning the vessel over to a discharging stevedore. *Derr*, 835 F.2d at 493-95. The Petitioner in this case asserts that the Third Circuit reached these conclusions based upon an erroneous interpretation of the 1972 Amendments to the Longshore and Harbor Worker's Compensation Act and this Court's decision in *Scindia Steam Navigation, Ltd. v. DeLos Santos*, 451 U.S. 156 (1981). Petitioner asserts that a vessel owner should have a duty to inspect the cargo after the loading operation is completed. As a practical matter, therefore, Petitioner is arguing that the vessel owner has a duty to supervise the work of an independent stevedoring contractor, a duty which was specifically rejected by this Court in *Scindia*. In *Derr*, therefore, the Third Circuit properly interpreted the 1972 Amendments and this Court's decision in *Scindia*.

In *Scindia*, this Court clearly and unequivocally held that a shipowner does not have a duty to inspect or supervise the cargo operations of an independent stevedore. This Court stated that "[t]he shipowner, within limits, is entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations." *Scindia*, 451 U.S. at 172 (1981). Congress' intent in passing the 1972 Amendments was "to terminate [the vessel's] automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore." *Id.* at 168. Thus, this Court concluded that a vessel owner does not have a duty "to discover and correct dangerous conditions that develop during the *loading* or *unloading process*." *Id.* at 169 (emphasis added). This Court recognized that imposing such a duty "would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship. . . . 'Creation of a shipowner's duty to oversee the stevedore's activity and insure the safety of longshoremen would . . . saddle the shipowner will precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b).' " *Id.* at 169, *quoting Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1249-50, n.35 (3d Cir. 1977).

As the lower court pointed out in *Robertson v. Tokai Shosen K.K.*, 655 F.Supp. 152 (E.D. Pa. 1987), the companion case in *Derr*, Petitioner's effort to limit the holding in *Scindia* to domestic stevedores makes absolutely no sense:

> Now, if one may not find the vessel liable for wrongs of the off-loading stevedore under the Act, then one can no more find the vessel liable for wrongs of the on-loading stevedore – assuming for the moment that such wrongs are committed.

. . .

> If I were to adopt the position ably advocated by plaintiff's counsel, I would eviscerate *Scindia* and the Act. Otherwise, while the vessel would not be required to supervise and inspect each stevedoring operation, *Scindia*, it would be held to such a requirement at each subsequent port which encountered the condition of the stow. This makes no sense, and would render the principle of fault based liability of the vessel a nullity.

Robertson, 655 F.Supp. at 154-155.

The Third Circuit Court of Appeals agreed with this rationale and concluded that "the real issue is not where the cargo was loaded, but whether a vessel may be held negligent for failure to inspect or supervise the stowage of cargo." *Derr*, 835 F.2d at 495.[3] The Third Circuit also

3. In a footnote, Petitioner asserts that § 412 of the Restatement (Second) of Torts is the standard which should be applied to a shipowner's responsibility for the negligence of a stevedore. This section of the Restatement, however, is an exception to the general rule regarding the liability of employers for the actions of independent contractors. The exception applies only to employers who have a duty to maintain land or chattels; it has no application in the present case and clearly does not establish the duties of a vessel owner regarding cargo loaded by an independent stevedore. If resort need be had to the Restatement for defining the duties of the vessel owner, the applicable section would be § 409, not § 412. *See, e.g., Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977). Under 409, "before liability can attach for such independently created danger, the owner must have *knowledge* of its existence and an opportunity to alleviate it." *Id.* at 862 (emphasis added).

In fact, in *Scindia*, this Court rejected the principle of § 412 of the Restatement which would make the vessel owner liable for supervising the work of the stevedore:

> As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. Section 41 of the Act, 33 U.S.C. § 941, requires the stevedore, the longshoremen's employer, to provide a "reasonably safe"

noted that "the scheme carefully drawn by Congress and interpreted in *Scindia* does not change because the cargo stowage was performed by foreign stevedores." *Id.* Therefore, based upon Scindia, the Third Circuit properly concluded that a vessel owner does not have a duty to supervise or inspect the loading operation of a foreign stevedore and a vessel owner does not have a duty to inspect the cargo before turning the vessel over to a domestic discharging stevedore.

2. *The Presence Of Crewmembers On Deck During The Loading Operation Is Not Enough To Reimpose A Duty To Supervise The Work Of An Independent Stevedore.*

In Section 2 of his Petition, the Petitioner seeks a Writ of Certiorari regarding a more narrow aspect of the *Derr* decision. In *Derr*, the Third Circuit Court of Appeals rejected the argument that mere "observation" of the loading operation by members of the crew is sufficient to hold a vessel owner liable for conditions that might be created by the longshoremen working in the holds. *Id.* at 494. The Third Circuit recognized that if "observation" on deck is sufficient to impose liability, this would effectively require the vessel to supervise the work of the stevedore. Therefore, the Third Circuit held that "such observation cannot be used to reimpose the general duty to supervise the stevedore." *Id.*[4] This

> place to work and to take such safeguards with respect to equipment and working conditions as the Secretary of Labor may determine to be necessary to avoid injury to longshoremen. The ship is not the common employer of the longshoremen and owes no such statutory duty to them.

Scindia, 451 U.S. at 169-170.

4. The Petitioner incorrectly summarizes the holding in *Derr*. Petitioner asserts that the Third Circuit held that evidence regarding the "custom" of observing loading operations is insufficient to establish liability for conditions created by the longshoremen, leaving open the possibility that actually observing the loading operation in general can establish liability. This is an inaccurate and illogical reading of *Derr*.

holding is in complete accord with the legislative history behind the 1972 Amendments to the Longshore & Harbor Worker's Compensation Act and this Court's decision in *Scindia*.

As previously noted, this Court concluded in *Scindia* that a vessel owner is "entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations." *Scindia*, 451 U.S. at 172. Furthermore, the position advanced by the Petitioner "would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship." *Id.* at 169. As this Court pointed out in *Scindia*, this would "saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b)." *Id.* at 1623, *quoting, Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1249- 50 n.35 (3d Cir. 1977). Therefore, this aspect of the *Derr* decision is entirely consistent with this Court's holding in *Scindia*.[5]

B. The Petition For Writ Of Certiorari Should Be Denied Because The Present Case Does Not Properly Present For Review The Conflict Between The Third, Fifth And Ninth Circuits Regarding A Shipowner's Liability For Improperly Stowed Cargo; Even Under The Standards Of Care Adopted In *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), And *Turner v. Japan Lines, Inc.*, 651 F.2d 1300 (9th Cir. 1981), Summary Judgment Was Properly Granted.

Petitioner asserts that "while, under *Scindia*, a vessel owner may not have a duty to supervise cargo operations while they are in process, . . . the shipowner would have an obligation to inspect the work of a loading stevedore after it is completed to discover any unsafe

5. The Fifth Circuit and the Ninth Circuit Courts of Appeals have never reached this issue. There is no conflict, therefore, regarding this more narrow issue.

conditions which might have been created as a result of that work." *See* Petition at pp. 8-9. According to Petitioner's own argument, however, the alleged unsafe condition in this case (i.e. plastic on the deck) could not be observed or discovered after the cargo was loaded. *Id.* at 14. Therefore, if Petitioner is, in fact, seeking to impose a duty upon the vessel owner to inspect the condition of the cargo after it is loaded, this case does not properly present this issue for review since it does not involve a condition that could have been discovered by a reasonable inspection.

In addition, even under the standards of care adopted in the Fifth and Ninth Circuits, summary judgment was properly granted in this case. In *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 853 (1990), the Fifth Circuit Court of Appeals held that a vessel owner has a duty to exercise "due care" before the vessel is turned over to a discharging stevedore "to ensure that the vessel's cargo is loaded such that it can be discharged with reasonable safety." *Id.* at 850. Accordingly, the Fifth Circuit held that a vessel owner may be liable for injuries resulting from negligently stowed cargo if "a reasonable owner/operator . . . would have perceived the dangers presented" by the condition of the cargo. *Id.* at 852. In other words, the vessel owner may be found liable if it "knew or should have known of the dangerous condition." *Id.* at 850. In addition, in *Turner v. Japan Lines, Inc.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), the Ninth Circuit Court of Appeals held that a vessel owner has "a duty to protect [domestic longshoremen] against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of." *Id.* at 1304. As in *Woods*, therefore, the *Turner* Court concluded that a vessel can be held liable if there is "sufficient evidence from which [a] jury could . . . conclude that the vessel knew or should have known" of the danger. *Id.*

In both *Woods* and *Turner*, there was sufficient evidence to establish that the vessel's crew knew, or should have known, of the unsafe condition. In *Woods*, the plaintiff was injured while discharging steel pipes located in the hold of a vessel. Before the discharge operation began, the vessel was notified by the stevedore's superintendent that the pipes represented a "bad stow." *Woods* 873 F.2d at 845. Therefore, the vessel had actual knowledge of the condition involved.

In *Turner*, the plaintiff was injured when a stack of plywood collapsed due to a lack of shoring. The Ninth Circuit found that there was sufficient evidence to support a finding that the shipowner "should have known" of the unsafe condition because the shoring operation would have taken "many hours of work by marine carpenters" and there was evidence that, as a matter of custom, the Captain was responsible for "overseeing the loading operations and particularly for ensuring that the cargo is properly shored." *Turner*, 651 F.2d 1302. The significance of this evidence is better understood after reviewing what is necessary under these holdings for establishing "reasonable care" on the part of a vessel owner and/or what is sufficient for establishing constructive knowledge of a dangerous condition in the shipping industry.

In *Mallard v. Aluminum Co. of Canada, Ltd.*, 634 F.2d 236 (5th Cir. 1981), the Fifth Circuit Court of Appeals set forth a lengthy discussion regarding constructive knowledge on the part of a vessel owner:

> In defining the scope of what the vessel owner "should know" [where a latent, non-obvious condition is involved], we remain cognizant of Congress' abolition of longshoremen's actions based upon unseaworthiness. Congress did not intend that the vessel owner be charged with knowledge of any latent defect on the vessel, since such a theory of liability would approach the unseaworthiness standard. Because it was concerned that courts might continue to hold vessels strictly liable for hazards by

viewing any unseaworthy conditions as negligence, Congress stressed that negligence should be determined by traditional non-maritime standards. The Restatement (Second) criteria of negligence subject a shipowner to liability only if he knows or has reason to know of an unreasonably dangerous condition on the vessel of which the longshoreman is probably not aware and fails to exercise reasonable care to make the condition safe or warn the longshoreman. As explained in *Slaughter v. Ronde*, 390 F.Supp. 637 (S.D. Ga. 1974), *aff'd*, 509 F.2d 973 (5th Cir. 1975), where a longshoreman was injured by shifting cargo, Congress, through passage of the 1972 Amendments, did not intend to derogate from the maritime law imposing liability on a vessel owner whose officers "see or have actual visual notice of, or ample time to observe, unsafe stevedoring operations" and do not take corrective action. 390 F.Supp. at 640. Heretofore, precedent in this circuit has required a showing of a *real opportunity for knowledge* to be gained during reasonably careful operation of the vessel before it is said that a vessel owner "should have known" of a nonobvious hazard posing danger to longshoremen engaged in stevedoring activities.

Id. at 244 (emphasis added). In addition, in a footnote, the Fifth Circuit continued its evaluation of the term "reasonable care" within the shipping industry:

> A shipowner's liability clearly must extend to those dangerous conditions of which he has actual notice plus those of which he should have notice by an exercise of reasonable care. The meaning of "reasonable care" within the shipping industry must be adduced in light of the special problems arising during the carriage of goods by sea. The reasonable care standard does not include the duty to actively supervise loading work. *Price v. S.S. Yaracuy*, 378 F.2d 156 (5th Cir. 1967). *Slaughter v. Ronde* states,

> "Reasonable care does not require ship's officers to inspect each hold daily to be sure that the 'stevedore has properly performed the work which it was hired to perform and that they inspect so thoroughly that they discover a danger which is not readily apparent and which is not appreciated by the longshoremen themselves.' " 390 F.Supp. 637, 644 (S.D. Ga. 1974) *aff'd*, 509 F.2d 973 (5th Cir. 1975) *(quoting, Williams v. Bowring Steamship Co.*, 1972 AMC 890, 897 (D.Conn. 1972). But if there is evidence that the ship's crew has conducted an inspection which either led to or should have led to the discovery of a perilous condition, the vessel owner may be negligent.

Id. at 244, n.9.

The "reasonable care" standard discussed in *Mallard* supports the holding of the Ninth Circuit in *Turner*. As the Ninth Circuit pointed out, it would have taken marine carpenters "many hours" to construct the proper shoring, the crew had an opportunity to inspect the work, and there was a custom that the master or one of his mates would inspect the work. Therefore, there was "a real opportunity for knowledge to be gained during reasonably careful operation of the vessel." *Id.* at 244.

In the present case, however, there is no evidence that the crew of the M/V PRESIDENTE IBANEZ had this type of "opportunity." There is no evidence that any crewmember observed, or had an opportunity to observe, that plastic had been placed on the deck of the No. 2 hold, nor was there a custom that the vessel's crew would supervise the loading operation. It is true the plastic was obtained from the vessel's supplies, but plastic could be used for a myriad of purposes during the loading of cargo aboard a vessel. As the district court noted, "being the supplier of equipment does not necessarily imply knowledge of its intended purpose." (4a). In addition, there is no evidence that plastic was used in any other hold, or on any other deck, other than the

immediate deck area where Petitioner fell. Furthermore, as Petitioner himself points out, as soon as the first layer of cocoa beans was loaded into the hold, the plastic could not be observed. Therefore, there is no evidence to support a finding that the vessel owner "knew or should have known" of the alleged unsafe condition and the vessel owner would have been entitled to summary judgment even if the case was pending in the Fifth or Ninth Circuits.

CONCLUSION

Although Respondent concurs with Petitioner that there is a conflict among the Circuits regarding a shipowner's liability for improperly stowed cargo, the present case does not properly present this conflict for review. Therefore, Respondent requests that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Excerpt from Court of Appeals Appendix
Testimony of Captain Daniel Cafena

Q. Have you ever seen plastic put on the deck?

A. In any other occasion?

Q. On any occasion with loading the cocoa beans.

A. Never with cocoa beans. Never with cocoa bean. It is not permitted.

Q. Why is it not permitted?

A. Because the cocoa beans are a very delicate cargo, and they could breathe, and the plastic would — they are very humid, moist and the plastic could cause more moisture.

Q. Who makes the decision as to what is put on the deck before the cocoa beans are stowed?

A. The stevedore.

Q. How do you know that?

A. Because it has always been that way. They should know what they have to do, and that is their job.

Q. Now, does your chief mate watch the loading of the cargo?

A. I would say yes, that he would do it, but he can't be attentive to everything that is happening.

* * *

Q. Is it your practice to assign one seaman to watch each hold?

A. No, it's not the practice to assign one man for each cargo. Normally they are watching all the cargo on the ship.

Q. How many holds are on the ship or on the PRESIDENTE IBANEZ?

CAPTAIN CAFENA: Cuatro.

THE INTERPRETER: Okay. Four.

Q. So that would it be fair to say — strike that. You have three men, three seaman and a mate, an officer — you have three seaman and an officer assigned to watch the four cargo holds?

MR. WRIGHT: Objection.

Q. You can answer.

A. Yes. Because many strangers or strange people could enter. There could be people who were trying to stow away drugs or stowaways.

Q. And those men will move from hold to hold during the course of the whole cargo operation watching what is happening?

A. Affirmative. Yes.

* * *

Q. Let me rephrase the question. When the ship was in Guayaquil in July of 1989, whatever the date, would the practice that you just described have been the practice that was followed on the ship?

A. Please remind me. What practice are you referring to?

Q. The practice of having the crew members watch the loading and to watch to see what was placed on the deck.

MR. WRIGHT: Objection.

A. The practice is this. To take care of the cargo and to make sure that no strange people come on the ship. Strangers.

Q. Would that have been the practice, to watch the cargo being loaded on the ship in Guayaquil, in July of 1989?

THE INTERPRETER: He says say it again slower.

Q. So that if plastic was placed on the deck under the cocoa beans in Guayaquil in July of 1989, one of the crew members should have seen it?

MR. WRIGHT: Objection.

A. Affirmative. And he would have advised me or one of the ship mates.

MR. WRIGHT: Chief mate.

THE INTERPRETER: Chief mate. I'm sorry.

Q. And if you had been advised, you would have directed that it be removed?

A. Immediately.

* * *

Q. In loading, unloading cocoa beans in Philadelphia in July of 1989, how many members of the crew would you have on deck — did you have on deck observing the unloading operation?

A. I had three sailors and one officer, watching not just the operation, but taking care of the whole ship.

Q. Going back to the loading of cocoa beans in Guayaquil, if plastic was placed on the deck underneath the cocoa beans, who would have ordered that plastic, if you know?

A. Who would have ordered to put the plastic?

Q. No. Yes first.

A. The stevedores.

Q. Who would have purchased the plastic?

A. The ship would buy the plastic. We purchase all of the materials for the operation. The plastic, the wood.

* * *

Q. Assuming that cocoa beans have been loaded on

board the PRESIDENTE IBANEZ for the voyage in question, and those cocoa beans had been loaded in Guayaquil, who would have loaded those cocoa beans?

A. The stevedores.

Q. And, captain, who made the decisions concerning what, if anything, would be placed underneath that cargo of cocoa beans?

A. The stevedores.

Q. Captain, can you tell the jury – strike that. Captain, have you ever observed cargo of cocoa beans loaded – being loaded by stevedores?

A. Yes. By the stevedores, yes.

Q. And what, if anything, is normally placed underneath those – that cargo of cocoa beans?

THE INTERPRETER: The "what if anything" –

A. Oh, what do they put in?

Q. Yes.

A. They put what they are supposed to put in this case, which would be wood and then paper.

Q. And then the cocoa beans are placed on top of the paper?

A. Always on the paper.

Q. Have you ever seen a stevedore loading – stevedore use plastic in the loading of cargo –

A. No.

Q. – at all or just underneath the cargo?

A. In this case, I have never seen a stevedore use plastic when loading cocoa beans. The ship mate would have ordered him to stop it immediately.

Q. Okay. We'll get to that in a second, captain. Have you

ever seen plastic used in connection with the loading of other cargo on board a ship?

A. Affirmative.

Q. How about on board the PRESIDENTE IBANEZ?

A. Yes. But carrying, for example, in Houston, corrosive drums. IMO cargo.

MR. WRIGHT: IMO cargo. All capital letters.

Q. Now, captain, at any time during loading of cocoa beans in Guayaquil, were you ever aware that the stevedore was using plastic underneath the cocoa beans?

MR. SOVEL: And by that you mean him personally?

MR. WRIGHT: Yes.

A. Never.

* * *

Q. Captain, in 1989, did you have a practice for reporting problems that your officers or crew members might observe during the course of loading on board the PRESIDENTE IBANEZ?

A. I always had.

Q. And what was that practice?

A. To observe, to make sure that there would be no robberies and to protect the ship.

Q. What would be the practice if your officers or crew members observed a problem in the manner in which the cargo was being loaded?

A. They would advise me immediately. That is a practice.

Q. And if a stevedore in Guayaquil had placed plastic down on one of the 'tween decks on the PRESIDENTE IBANEZ and then placed a cargo consisting

of cocoa beans on top of that plastic, is that something that would have been reported to you?

MR. SOVEL: Objection.

A. Immediately.

Q. And why would that have – why would that be something that would be reported to you?

MR. SOVEL: Objection.

A. Because it's not usual – because you should not be plastic with the cocoa beans.

Q. And, captain, why is plastic not ordinarily used in the loading of cocoa beans?

A. Because the plastic produces moisture and cocoa beans go bad with the moisture.

Q. Are you aware of any other problems arising from the use of plastic with cocoa beans?

A. Aparts from the moisture, no.

Q. Okay. Captain, if you – strike that.

Captain, were you also on board the vessel during the course of discharge operations in Philadelphia in July of 1989?

A. Affirmative.

* * *

Q. Now, you testified that the longshoremen made the decision to put paper and wood underneath the cocoa beans?

A. Affirmative.

Q. Isn't it correct that if they did not do that, you would require them to do that?

MR. WRIGHT: Objection, but –

A. They have to do it.

Q. So the ship requires them to do that?

MR. WRIGHT: Objection.

A. The stevedores have to fulfill their jobs. If not, the agency would throw them out.

Q. But they do not have authority to decide not to put the wood or paper under the cocoa beans, do they?

MR. WRIGHT: Objection.

A. They have the decision to do it.

Q. Well, do they have – do they have – can they make a decision not to do it?

A. If they did it, it would not be correct.

Q. And what would you do?

A. This case has never happened to me.

Q. Would you – if you learned that they were not doing it, would you not tell them to do it?

MR. WRIGHT: Objection.

A. I would have told them.

Q. And would you not have insisted that they do it?

MR. WRIGHT: Objection.

A. Normally, we don't repeat the order. If I would have told them – I've never had a case like this happen to me.

Q. Is what you are saying that if you tell them, they will do it?

A. Possibly they would do it.

Excerpt from Court of Appeals Appendix
Testimony of Joseph Fisher

Q. Do you know if plastic was used in any other hatch aboard this vessel?

A. I don't know.

Q. Did you work at any other hatch?

A. Yes.

* * *

Q. When you looked down at the exposed area, could you see the plastic?

A. I don't understand what you mean.

Q. After Mr. Howlett fell, did you go over to that area?

A. Yes.

Q. And when you looked down, you could see Mr. Howlett on the ground?

A. Yes.

Q. When you looked at the deck area, could you see plastic?

A. Yes.

Excerpt from Court of Appeals Appendix
Testimony of Raymond McMullen

Q. How did you first find out that Mr. Howlett was involved in an accident?

A. I believe he came up to me and told me that he had hurt himself.

Q. And where were you when he told you this?

A. I believe I was on the deck.

* * *

Q. Did you conduct any type of investigation, talk to anyone else who was in the hold, or anything else to find out what happened?

A. I just looked down the hatch and seen plastic laying on the ground. I didn't talk to no one.

* * *

Q. As ship boss, you were also responsible for overseeing what was going on in the other hatches?

A. Yes.

Q. Do you know if there was plastic used in the other hatches?

A. I don't remember.

Supreme Court, U.S.
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93-670

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALBERT HOWLETT,

Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION AND SUPPLEMENTAL APPENDIX

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93-670

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1. ***Riggs v. Scindia Steam Navigation Company, et al.*, ___ F.2d ___, U.S. App. LEXIS 28861 (9th Cir, 1993), decided subsequent to the filing of the Petition in the instant case, demonstrates the extent of the conflict in circuits in this area of the law and the need for this Court to review and resolve the conflict.**

On November 8, 1993, subsequent to the filing of the Petition in this case, the Court of Appeals for the Ninth Circuit filed an Opinion in *Riggs v. Scindia Steam Navigation Company, et al.*, ___ F.2d ___, U.S. App. LEXIS

28861 (9th Cir, 1993). The Opinion in *Riggs* bears strongly on the issues raised by the instant Petition, and, indeed, responds to many of the assertions made in Respondent's Brief in Opposition.[1]

In *Riggs, supra,* the Ninth Circuit reaffirmed not only its holding, but also the reasoning of its decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), and extended the *Turner* holding to hazardous conditions in a cargo stow which were "open and obvious." The Court concluded:

IV. Conclusion

Turner holds that the turn over duty of safe condition extends to concealed cargo defects. *Martinez* holds that the duty applies to open and obvious equipment (and vessel) hazards, as well as to concealed ones. We now complete the circle. Taken together, *Turner* and *Martinez* lead directly and inexorably to the conclusion that a vessel's turn over duty of safe condition extends to protecting against open and obvious cargo hazards. (16c) (Emphasis by underlining supplied)

In *Riggs*, the Ninth Circuit, revisited its decision in *Turner*. The Court first noted, as it did in *Turner*, that Section 905(b) of the Longshore and Harbor Workers Compensation Act does not bar a shipowner from obtaining a recovery from a foreign loading stevedore (as distinguished from the injured longshoreman's own employer) (6c), a point which was ignored by the Third Circuit in the *Derr* decision and which is not addressed by Respondent in its Brief in Opposition. In contrast to the Third Circuit's ignoring of the right of a vessel to bring an action against a foreign loading stevedore whose negligence may have creat-

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1. Since the Opinion in *Riggs v. Scindia Steam Navigation Company, et al.* is not yet officially reported, we have attached a copy of the Court's Slip Opinion as a supplemental appendix hereto at pages 1c through 17c.

ed a hazardous condition, the Ninth Circuit, in *Riggs*, emphasized the importance of this remedy as an instrument of accomplishing the Congressional goal of encouraging vessel safety. The Ninth Circuit stated, in words which would be equally applicable to the instant case:

> *Turner's* holding that the turn over duties of safe condition and warning encompass non-obvious dangerous conditions in stowed cargo rested on our conclusion that such a rule would further the Congressional goal of safety that underlies the LHWCA. 581 F.2d at 1304. We reasoned that neither the off-loading longshoreworker nor his stevedore-employer could exercise any control over the on-loading foreign stevedore. Only the vessel could do so, by choosing a reliable foreign stevedore, supervising its work when necessary, and correcting concealed dangers or warning the off-loading stevedore of them. *Id.* Moreover, we noted that in many cases, the injured worker could not sue the foreign stevedore, who would be beyond the reach of process of a federal district court. All of these factors are equally applicable in the case of an open and obvious cargo defect.
>
> We noted in *Turner* another factor that is also equally applicable to both types of *cargo defects*. We recognized that section 905(b) does not bar a shipowner from recovering against a foreign stevedore, who is not an "employer" within the meaning of the LHWCA, where the stevedore is primarily at fault for the off-loading longshoreworker's injuries. 651 F.2d at 1303-04. As we recently stated in *Carpenter v. Universal Star Shipping SA*, where we reaffirmed our holding and reasoning in *Turner*. "The prospect of vessel-initiated actions against foreign stevedores provides foreign stevedores with an incentive to do their work carefully." 924 F.2d 1539, 1544 (9th Cir. 1991) (10c) (Emphasis by underlining supplied)

The *Riggs* opinion also specifically rejected the Third Circuit's position that the term "work space" did not encompass a vessel's cargo stow, stating, at footnote 5:

. . . Several Circuits have concluded that the duty of safe condition extends to the "work space", but there is some disagreement as to whether the cargo falls within the term "work space". *Compare Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir. 1986)(turn over duty of safe condition extends to ship's work space, which includes cargo) *with Kirsch v. Plovidba*, 971 F.2d 1026, 1031 n. 7 (3rd Cir. 1992)(turn over duty of safe condition applies to "physical work space" but not cargo). As explained in text, Ninth Circuit law is in accord with that of the Fifth Circuit. (8c) (Emphasis by underlining supplied)

Finally, the *Riggs* opinion rejects, in rather strong language, the contention that there should be a difference between the ship's responsibility for defective conditions in a cargo stow which are obvious and its responsibility for defective conditions which are hidden, stating:

. . . As noted earlier, the Third Circuit takes the position that the turn over duty of safe condition does not encompass *any* cargo-stow defects, whether hidden or obvious. No circuit, however, has adopted a rule similar to that urged by the vessel -- that a duty exists as to concealed defects but not as to open and obvious ones. We see no reason to create further confusion in this already complicated area of the law by drawing such an untenable and artificial distinction. Therefore, we join the Fifth Circuit in holding that the duty of safe turn over encompasses open and obvious, as well as concealed cargo hazards. (13c) (Emphasis by underlining supplied)

The decision of the Ninth Circuit in *Riggs, supra,* stands in stark contrast to the Third Circuit's holding in *Derr*, under which the instant case was decided, that the ship has no duty to inspect the manner in which cargo is stowed by a loading stevedore and has no responsibility for conditions which are "open and obvious." If it were not already clear, the *Riggs'* decision demonstrates how deep is the conflict in circuits in this area of the law and the necessity for this

Court granting a Writ of Certiorari and resolving the conflict.

2. The instant case fully presents for review all the issues on which there is a conflict in circuits relating to a shipowner's liability for improperly stowed cargo. Summary judgment would not have been granted to Respondent under the law as it exists in the Fourth, Fifth and Ninth Circuits.

Respondent devotes a considerable portion of its Brief in Opposition to arguing that the Petition should be denied because, on the facts of the case, Respondent would have been entitled to summary judgment had this case been brought in the Fifth or Ninth Circuits. The principle thrust of Respondent's argument is that, even though it supplied the plastic to the loading stevedore, there is no evidence that it knew that the plastic had been placed under the stow of cocoa beans. This argument is without merit as, contrary to Respondent's assertions, there is ample, indeed compelling, evidence that the crew of the ship knew, or at least had reason to know, that the plastic had been placed under the cocoa beans.

Initially there is the testimony of the ship's Captain that the crew observed the cargo loading operation and, if plastic had been placed on the deck under the stow of cocoa beans, these crew members should have seen it (17a). In any other Circuit but the Third Circuit, this testimony, standing by itself, would have created an issue of fact as to whether the crew had constructive knowledge that plastic had been placed on the deck under the stow of cocoa beans, *see Bueno v. United States*, 687 F.2d 318, 320 (9th Cir. 1982). Respondent, however, argues that this testimony as to observations should not be considered because to do so would be tantamount to imposing a duty on the shipowner to "supervise" the stevedore (see Respondent's Brief in Opposition at pages 9-10). Nothing could be further from the truth. The issue is not whether the shipowner has a duty to supervise the stevedore, but, rather, what "knowledge" did the shipowner have, *Ibid.*

If a shipowner, as did the Respondent in the instant case, directs its crew members to observe cargo loading operations, can it escape responsibility for what those observations disclose on the grounds that it had no duty to make the observations? It is not the making of an observation that triggers a duty of care -- it is the "knowledge" of an unsafe condition acquired by that observation which triggers the duty of care.

Whether one characterizes the practice of the crew of a ship to watch cargo operations as being "observations" or "inspections" is a matter of semantics -- a distinction without a difference. How a defendant may have acquired knowledge of an unsafe condition -- whether by "observation" or "inspection" -- is irrelevant once it is established that the defendant had reason to have the knowledge. For this reason, Respondent can not escape responsibility for knowledge of what the crew admittedly should have observed on the basis that it was not under any duty to make the observations. Under the decisions in *Woods, supra, Turner, supra,* and *Riggs, supra,* a shipowner would have duty to make "reasonable" inspections of cargo loading operations. That is what the crew of the Respondent's ship actually did in this case. Having done so, whether one calls what the crew did an act of "observation" or an act of "inspection," Respondent must be deemed to have knowledge of what such "observations/inspections" would reasonably disclose.

Respondent's final argument is that the fact that it supplied the plastic to the loading stevedore does not give rise to an inference that it knew the purpose for which the plastic would be used because, in Respondent's words, "plastic could be used for a myriad of purposes during the loading of cargo aboard a vessel" (see Respondent's Brief in Opposition at page 14). We respectfully submit that this argument is incredulous, particularly when one considers the evidence of record in this case.

First, contrary to the assertion made at page 4 of Respondent's Brief in Opposition, the evidence establishes that the Captain of the ship did require the loading stevedore to

put a separation material under the cocoa beans. Initially, under the direct examination of counsel for Respondent, the ship's Captain testified that the decision to place a separation material under the cocoa beans was made by the loading stevedore. However, subsequently, under cross-examination, he admitted that the ship required this to be done and the loading stevedore had no discretion not to do it.[2]

Secondly, it was admitted that the ship supplied the loading stevedore with all the materials needed to load the cargo, whether it be wood, paper or plastic. It was on the basis of this testimony that Respondent was forced to admit that it supplied the plastic that was under the cocoa beans at the time Petitioner was injured.

Third, while the ship's Captain stated that it would be improper to use plastic for loading cocoa beans, when asked what the plastic which the ship carried was used for, he did not mention any "myriad of purposes", but rather stated that it was used in connection with the stowage of drums containing corrosive chemicals.[3]

Fourth, the ship's stowage plan for the voyage in progress at the time Petitioner was injured does not show that any drums containing corrosive chemicals were being carried and, moreover, the ship's Captain testified that the only cargo, other than cocoa beans, ever loaded at Guayaquil was bananas (18c), so that plastic would not normally be needed by the stevedore in Guayaquil.

While counsel for Respondent argues that there were a "myriad" of purposes for which plastic might be used in

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2. The testimony of the ship's Captain on this point is set forth in the Supplemental Appendix submitted herewith at 18c-19c.

3. The testimony of the ship's Captain on this point is set forth at 3b-5b and 18c.

stowing cargo, there is no evidence anywhere in the record in this case of any alternative uses for the plastic other that the testimony of the ship's Captain that the ship carried plastic for use in loading drums of corrosive chemicals. Since no drums of corrosive chemicals were loaded in Guayaquil, if the ship supplied the plastic to the loading stevedore, as it admits it did, it could only have been supplied for use in loading the cocoa beans. In addition, since the ship required that the loading stevedore in Guayaquil put a separation material under the cocoa beans, and since the plastic carried by the ship was capable of being used for this purpose (albeit that such use was improper), and since there was no other apparent purpose for which the plastic would be used, Respondent's contention that it did not know the use to which the plastic would be put is -- to put it mildly -- not credible. By way of example, given the testimony that plastic would not normally be used in the loading of cocoa beans, would not a "reasonably careful" operator of a ship, *see Mallard v. Aluminum Co. of Canada, Ltd.*, 634 F.2d 236, 244 (5th Cir. 1981), when asked by a loading stevedore for plastic, have inquired as to what use the plastic would be put? Respondent's argument that it gave the plastic to the loading stevedore without knowing the purpose for which the loading stevedore intended to use it is simply not believable. For purposes of a motion for summary judgment, which was the basis on which this case was determined in the court below, the evidence that the ship supplied the plastic, coupled with the evidence that the crew observed the loading operation and had the opportunity to observe if plastic was being placed on the deck under the stow of coca beans, was more than sufficient to establish the existence of a genuine issue of material fact as to whether the ship knew or had reason to know that the loading stevedore in Guayaquil was using the plastic as a separation material under the cocoa beans.

Under the decisions in *Woods, supra, Turner, supra,* and *Riggs, supra,* the shipowner's duty of reasonable care extends to unsafe conditions existing in a cargo stow of which the shipowner knows or has reason to know. There is ample evidence in the instant case that the unsafe condition which caused Petitioner's injuries -- the presence of the

sheet of plastic under the stow of cocoa beans -- was a condition of which the respondent either knew or had reason to know. Accordingly, this case clearly presents the issue on which the Third Circuit is in conflict with the decisions of the Fourth, Fifth and Ninth Circuits.[4]

---

4. The suggestion by counsel for Respondent, at footnote 1 to Respondent's Brief in Opposition, that the Petition should be denied because Respondent has denied that it was in possession of the vessel is without merit and is misleading in that it fails to disclose that its claim that it was not in possession of the vessel was never determined in either the district court or by the Third Circuit and that no final order was ever entered in favor Empresa Maritima Del Estado which could be the subject of a Petition for a Writ of Certiorari.

The instant suit by Petitioner was filed against Respondent, Birkdale Shipping Co., S.A., on December 30, 1991. Counsel for Respondent filed an Answer in which they admitted ownership of the vessel but did not raise as a defense that the vessel was under a demise charter. Subsequently, on July 22, 1992, counsel for Respondent filed the instant motion for summary judgment which was only on behalf of Respondent, Birkdale Shipping Co., S.A.

Thereafter, counsel for Respondent advised counsel for Petitioner of the possible existence of a demise charter of the vessel to Empresa Maritima Del Estado (hereafter "Empresa"), at which point, because the statute of limitations was about to expire, Petitioner filed a protective action against Empresa. Counsel for Respondent herein then entered their appearance and filed an Answer [redacted] on behalf of Empresa.

The district court judge before whom the motion for summary judgment was pending was advised of the existence of a possible dispute over who was the operator of the vessel but, in ruling on the motion, specifically declined to rule on this dispute. Instead, he stated, at footnote 1 to his opinion of October 1, 1992, as follows:

> 1. The operator of this vessel on the date of the alleged injury is in dispute. This court will not deal with this issue for purposes of this motion. (1a) (Emphasis supplied)

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that a Writ of Certiorari should issue to review the Judgment below.

Respectfully submitted,

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...Continued...

No separate motion for summary judgment was ever filed on behalf of Empresa, and, in ruling on the motion for summary judgment, the district court judge entered judgment only in favor of Respondent, Birkdale Shipping Co., S.A. (6a). It was this judgment that the Third Circuit affirmed by Judgment Order (10a-11a).

The status of the record in this case at the present time is that Respondent's claim that it was not the possessor of the vessel is an unresolved issue which, should this Court grant the Petition and reverse the decision below, would then have to be determined along with other issues going to the merits of Petitioner's claim. If it should be determined that Empresa, rather than Respondent, was the possessor of the vessel at the time Petitioner was injured, then the action would proceed against Empresa, as the action against it is still pending. There would be no prejudice to Empresa because it is represented by the same counsel now representing Respondent herein.

SUPPLEMENTAL APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL RIGGS,
Plaintiff-Appellant,
v.
SCINDIA STEAM NAVIGATION COMPANY and THE SHIPPING CORPORATION OF INDIA,
Defendants-Appellees.

No. 92-55139
D.C. No.
CV-90-4812 HLH
OPINION

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
July 15, 1993—Pasadena, California

Filed November 8, 1993

Before: Harlington Wood, Jr.,* Stephen Reinhardt, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Reinhardt; Concurrence by Judge Rymer

SUMMARY

Admiralty and Marine/Workers Compensation/Torts

The court of appeals reversed a district court judgment and remanded. The court held that longshoreworkers who are

*Honorable Harlington Wood, Jr., Senior United States Circuit Judge, Seventh Circuit Court of Appeals, sitting by designation.

injured on board vessels while off-loading cargo stowed in an openly and obviously hazardous manner by foreign stevedores may maintain negligence actions against the vessels.

Appellant Michael Riggs worked as a longshoreman assigned to unload cargo from a vessel owned by appellee Scindia Steam Navigation Co., Ltd., and time-chartered by appellee The Shipping Corp. of India (SCI). The on-loading foreign stevedore improperly stowed the cargo in an openly and obviously hazardous manner. Riggs was injured while unloading the cargo.

Riggs sued Scindia and SCI (collectively, the Vessel) under the Longshore and Harbor Workers' Compensation Act (LHWCA), claiming that the Vessel negligently failed to provide him a reasonably safe place to work. The district court granted summary judgment to the Vessel on the basis that it had no legal duty to prevent or alleviate the unsafe conditions in the cargo hold, because the dangers were open and obvious to the longshoreworkers. Riggs appealed, contending that the Vessel's "turn over duty of safe condition" extended to open and obvious cargo hazards that existed at the time the vessel was turned over to the longshoreworkers for unloading.

[1] A Ninth Circuit case, *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), squarely holds that the turn over duty of safe condition encompasses concealed hazards in cargo on-loaded by foreign stevedores. [2] *Turner*'s holding rested on the conclusion that such a rule would further the Congressional goal of safety that underlies the LHWCA. The court reasoned that the off-loading longshoreworker could not exercise any control over the on-loading foreign stevedore; only the Vessel could do so. In addition, the court noted that in many cases the injured worker could not sue the foreign stevedore, who would be beyond the reach of the processes of a federal district court.

[3] All of the considerations on which the court relied in *Turner* are equally applicable in the case of open and obvious

defects. Moreover, the Ninth Circuit has previously rejected the argument that the duty of safe condition does not extend to open and obvious defects — at least insofar as a vessel and its equipment are concerned. [4] The principle that a vessel's failure to correct an open and obvious defect may constitute unreasonable conduct leading to liability has equal force with respect to hazards in the stowage and hazards occurring elsewhere on a vessel. [5] Thus, the duty of safe turn over encompasses open and obvious, as well as concealed cargo hazards.

Circuit Judge Rymer concurred, stating that it is unclear that imposing a turn over duty of care to protect stevedores from poor cargo conditions squares with the restrictive rules of liability of shipowners to stevedores envisioned by the LHWCA.

COUNSEL

Marc Coleman, Middleton & Coleman, San Pedro, California, for the plaintiff-appellant.

Dawn Schock, Keesal, Young & Logan, Long Beach, California, for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

We decide here that longshoreworkers who are injured on board vessels while off-loading cargo stowed in an open and obviously hazardous manner by foreign stevedores may maintain negligence actions against the vessels. The district court reached a contrary conclusion. Accordingly, we reverse the grant of summary judgment to the vessel, and remand.

I. *Background*

On October 2, 1989, Michael Riggs sustained injuries while working as a longshoreman for Stevedoring Services of America. Riggs and his longshore gang were assigned to unload cargo from the M/V Jalagopal. The Jalagopal was owned by Scindia Steam Navigation Company, Ltd. ("Scindia") and time-chartered by The Shipping Corporation of India ("SCI"). The vessel's cargo, which had been loaded overseas by a foreign stevedore, consisted of three-inch steel pipe tubing bundled together and covered with slippery plastic wrapping. There was uncontested evidence, including expert testimony, that the on-loading stevedore had improperly stowed the cargo and that the pipes were strewn throughout the hold in an openly and obviously hazardous manner.[1] Riggs injured his back when he slipped between two pipe bundles during the unloading operations.

Riggs brought suit against Scindia and SCI (collectively "the vessel")[2] under section 5(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. section 905(b), claiming that the owner and the time-charterer of the Jalagopal had negligently failed to provide him a reasonably safe place to work. Riggs contended that the vessel's negligence consisted of its failure to supervise properly the cargo loading operations of the foreign stevedore. The district court granted summary judgment to the vessel on the basis that it had no legal duty to prevent or alleviate the unsafe conditions in the cargo hold, because the dangers were open and obvious

[1]The pipes were stowed without dunnage (loose materials placed within the cargo to keep it from shifting) or shoring (vertical supports).

[2]As explained *infra*, section 5(b) of the LHWCA establishes the liability of "vessels" to injured longshoreworkers. Because a "vessel" includes its owner and charterer, both Scindia and SCI are potentially liable to Riggs. *See* 33 U.S.C. § 902(21); *see also Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1542 (9th Cir. 1991) (same standards of care apply to shipowners and charterers). The question of any contractual indemnity between Scindia and SCI is not before us.

to the longshoreworkers. We have jurisdiction under 28 U.S.C. section 1291, and we review the grant of summary judgment *de novo*.

II. *Legal Framework*

A. *The 1972 Amendments to the LHWCA*

Prior to 1972, vessels were strictly liable under the maritime doctrine of unseaworthiness for any injuries sustained by longshoreworkers due to unsafe on-board conditions. Although absolutely liable to the injured longshoreworkers, vessels were able to shift the cost by suing the stevedore-employers on the theory that they had breached an expressed or implied warranty of workmanlike performance. Because this system resulted in much unnecessary litigation, Congress amended the LHWCA in 1972 in an attempt to bring it into conformity with the practical realities of the maritime world. *See* H.R. Report No. 1441, 92 Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 4698, 4702-04 (describing purpose of P.L. 92-576, Oct. 27, 1972, 86 Stat. 1251).[3]

The 1972 amendments gave longshoreworkers a no-fault workers-compensation remedy against their stevedore-employers. 33 U.S.C. § 904. The amendments abolished a vessel's absolute liability to an injured longshoreworker under the unseaworthiness doctrine, but retained a statutory action against vessels for *negligence*. § 905(b).[4] In addition, the

[3]The Senate Report, S. Report No. 1125, is identical in all relevant respects to the House Report.

[4]That section provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone else entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this section and the employer shall not be liable to the vessel for such damages directly or indirectly

amendments barred vessels from seeking indemnity from the longshoreworker's "employer". *Id.* However, an "employer" is defined in such a way as to exclude foreign stevedores. *See* § 902(4). Thus, by its terms section 905(b) does not prohibit a vessel from obtaining a recovery against a foreign on-loading stevedore and does not allocate liability between those two entities.

The House Report states that the result of the 1972 amendments would be "to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third-party damages action is concerned." 1972 U.S.C.C.A.N. at 4703. The Report concludes:

> Permitting actions against a vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

Id. at 4704. However, Congress did not specify the conditions under which a vessel could be liable for a breach of its duty of care, but instead left this task for the courts to resolve through the "application of accepted principles of tort law and the ordinary process of litigation." *Id.* The courts have pro-

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> and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

Section 933 *inter alia* provides that in certain situations the stevedore-employer is assigned the longshoreworker's right to sue the vessel for compensation. *See Carpenter*, 924 F.2d at 1541-42.

ceeded to accept that responsibility, and this decision simply constitutes one further step in that process.

B. *A Vessel's Duties to a Longshoreworker*

Any discussion of the scope of the duties imposed by section 905(b) must begin with *Scindia Steam Navigation Company, Ltd. v. De Los Santos*, 451 U.S. 156 (1981). In *De Los Santos*, a longshoreman was injured while loading cargo into the ship's hold. The cargo fell from a pallet suspended by a winch, which was part of the ship's gear. The winch's braking mechanism had allegedly been malfunctioning for two days prior to the accident. In defining the vessel's duty of reasonable care under the circumstances the Court drew a line between "turn over" duties, which arise before the vessel is turned over to the stevedore and its longshoreworkers, and the other duties that arise after the vessel is turned-over. The case before us involves only the first type of duty—that which arises prior to turn over.

De Los Santos determined that a vessel's turn over duties extend *at least* to: 1) having the ship, its equipment, gear and tools, and the work space to be used in stevedoring operations in such condition that an experienced stevedore can by exercising reasonable care carry on its cargo operations with reasonable safety ("the turn over duty of safe condition"); and, 2) warning the stevedore of *hidden* dangers that are known to the vessel or should have been known to it in the exercise of reasonable care with respect to any hazards on the ship, in its equipment, gear or tools, or in the work space ("the turn over duty to warn"). 451 U.S. at 167; *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1207 (9th Cir. 1989). It is the first turn over duty (safe condition) that is at issue here.

[1] Riggs contends that the turn over duty of safe condition extends to cargo hazards that exist at the time of turn over, both "open and obvious" and concealed. The vessel argues that under *De Los Santos* and the law of this circuit the turn

over duty of safe condition extends only to the vessel and its equipment and not to its cargo at all.[6] The vessel is clearly wrong, at least in part. Ninth Circuit precedent squarely holds that the turn over duty of safe condition encompasses *concealed* hazards in cargo on-loaded by foreign stevedores. *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982). Therefore, the only question for us to resolve is whether it extends to open and obvious defects in such cargo as well. We hold that it does.

III. *Discussion*

A. Turner v. Japan Lines *Holds that the Turn Over Duty of Safe Condition Extends to Concealed Cargo Hazards Created by Foreign On-Loading Stevedores.*

In *Turner*, which was decided several months after *De Los Santos*, we rejected the argument that a vessel's turn over duties do not extend to the cargo stow. *Turner* involved an off-loading longshoreworker who was injured when a stack of plywood collapsed beneath him. Expert testimony indicated that the plywood had been improperly stowed by the on-loading foreign stevedore. We held that the vessel could be sued for failing to "protect" the injured longshoreworker against concealed cargo dangers, created by a foreign on-loading stevedore, of which the vessel knew or should have

[6]In discussing the scope of the turn over duties in *De Los Santos*, the Supreme Court explicitly stated that the duty to warn extends to the "work space" but also implied that the duty of safe condition does so as well. *See* 451 U.S. at 167. Several circuits have concluded that the duty of safe condition extends to the "work space", but there is some disagreement as to whether the cargo falls within the term "work space". *Compare Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir. 1986) (turn over duty of safe condition extends to ship's work space, which includes cargo) *with Kirsch v. Plovidba*, 971 F.2d 1026, 1031 n.7 (3d Cir. 1992) (turn over duty of safe condition applies to "physical work space" but not cargo). As explained in text, Ninth Circuit law is in accord with that of the Fifth Circuit.

known, and which the vessel could, in the exercise of reasonable care, have "corrected" or warned of.[6] *Id.* at 1304.

Our statement in *Turner* that a vessel has a duty to "correct" concealed dangers in the cargo before turning the vessel over to the off-loading stevedore makes clear that our decision there encompassed the turn over duty of safe condition as well as the turn over duty to warn. Moreover, we have subsequently described *Turner* as setting forth a vessel's duty "to make the ship safe for longshoremen before turning the ship over to the stevedore." *See Ollstead v. Greenville Steamship Corp.*, 739 F.2d 1049, 1052 & n.2 (9th Cir. 1984); *see also Martinez v. Korea Shipping Corp., Ltd.*, 903 F.2d 606, 610 n.2 (9th Cir. 1990) (citing *Turner* in the context of a discussion of the turn over duty of safe condition).

In the decision we review here, the district court correctly recognized that *Turner* addressed the turn over duty of safe condition but erroneously limited the *Turner* rule to *concealed* cargo defects. The district judge stated:

> While *Turner*, *supra*, involved liability created by a condition of the stow, the facts of *Turner* involved a concealed defect and not an "open and obvious" one. Plaintiff has failed to cite any Ninth Circuit authority wherein the shipowner has been held liable for an unsafe condition of the cargo which was open and obvious to the longshoremen working the hold.

The district court was correct that there is no direct Ninth Circuit authority on point. Rather our decision is dictated by the logic of our precedents.

[6]Because the case before us, like *Turner*, involves a *foreign* on-loading stevedore, we have no occasion to decide, and express no opinion regarding, whether a vessel has a duty to correct or warn of dangers (whether concealed or open and obvious) created by a domestic on-loading stevedore who is not the employer of the off-loading longshoreworkers.

[2] *Turner*'s holding that the turn over duties of safe-condition and warning encompass non-obvious dangerous conditions in stowed cargo rested on our conclusion that such a rule would further the Congressional goal of safety that underlies the LHWCA. 581 F.2d at 1304. We reasoned that neither the off-loading longshoreworker nor his stevedore-employer could exercise any control over the on-loading foreign stevedore. Only the vessel could do so, by choosing a reliable foreign stevedore, supervising its work when necessary, and correcting concealed dangers or warning the off-loading stevedore of them. *Id.* Moreover, we noted that in many cases, the injured worker could not sue the foreign stevedore, who would be beyond the reach of the processes of a federal district court. All of these factors are equally applicable in the case of an open and obvious cargo defect.[7]

We noted in *Turner* another factor that is also equally applicable to both types of *cargo defects*. We recognized that section 905(b) does not bar a shipowner from recovering against a foreign stevedore, who is not an "employer" within the meaning of the LHWCA, where the stevedore is primarily at fault for the off-loading longshoreworker's injuries. 651 F.2d at 1303-04. As we recently stated in *Carpenter v. Universal Star Shipping SA*, wnere we reaffirmed our holding and reasoning in *Turner*: "The prospect of vessel-initiated actions against foreign stevedores provides foreign stevedores with an incentive to do their work carefully." 924 F.2d 1539, 1544 (9th Cir. 1991).[8]

[7]Because the injury in *Turner* was caused by a concealed cargo defect, there was simply no reason for us to discuss whether the same principle applies to open and obvious ones.

[8]In *Carpenter* we described *Turner* as holding vessels liable for their failure to "intervene" to protect the longshoreworker. 924 F.2d at 1539. Our use of the term "intervene" in *Carpenter* is somewhat confusing because, the "duty to intervene" is technically a post-turn over duty, *see, e.g., Bjaranson*, 873 F.2d. at 1207, and *Turner* involved a ship's duties at the time of turn over. Nevertheless, our intent to hold vessels liable for their negligence in connection with the actions of foreign on-loading stevedores and our reasons for doing so are clear.

Turner and *Carpenter* are fully consistent with *De Los Santos*. *Turner* simply resolves an issue not before the Court in the earlier case and *Carpenter* endorses that action. Because the accident in *De Los Santos* occurred while the domestic stevedore was *loading* cargo onto the vessel and the alleged negligence pertained to the vessel's equipment, the Supreme Court simply had no reason to consider the scope of a vessel's turn over duties with respect to improperly stowed cargo, let alone cargo improperly stowed *before* stevedoring operations began.[9]

The vessel incorrectly asserts that *Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984), holds that the turn over duty of safe condition does not extend to defects in the cargo. In *Taylor*, a longshoreman was injured when he fell while unloading mung beans. The bags containing the beans were torn, and as the longshoreworkers unloaded cargo, the beans blew onto the deck, eventually causing Taylor to fall. After a bench trial, judgment was entered for the vessel. The district court specifically found that the turn over duty of safe condition had *not been breached* because the stowage of the bags was not unreasonably dangerous. 733 F.2d at 1386. We affirmed.

The vessel misconstrues our statement in *Taylor* that the turn over duty of "safe condition focuses on the character of the ship and its equipment—not on the nature of the cargo", *id.*, as a holding that that duty does not apply to cargo defects. This sentence must be read in light of our conclusion that the cargo constituted a safe stow and did not become dangerous until hazardous conditions arose following the commence-

[9]Moreover, *De Los Santos* was primarily concerned with a dangerous condition that *developed* during cargo operations *after* the stevedore had taken control. *See Ollstead*, 739 F.2d at 1052; *accord Kirsch v. Plovidba*, 971 F.2d 1026, 1029 (3d Cir. 1992) (*De Los Santos* turns on duty of ship's crew to intervene after stevedore has begun cargo operations); *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 298 (5th Cir. 1984) (same).

ment of the off-loading stevedore's operations and the off-loading stevedore then acted unreasonably in the face of those conditions. If, as the vessel argues, the duty to turn over a vessel in safe condition does not include the cargo, then in *Taylor* we would not have determined that the cargo was not stored in a dangerous manner. We simply would have held that the vessel was immune as a matter of law from liability under a duty of safe condition theory because a cargo defect was the cause of the longshoreworker's injuries.

In *Taylor*, we concluded that the reason that the unloading longshoreman was not entitled to assert a claim against the shipowner under the turn over duty of safe condition was because

> [t]he torn sacks of beans, lying in the hold posed no threat; it was only when the cargo discharge began and the wind blew the beans on the deck and winch platform that a hazardous condition developed. Thus, it was not the torn sacks but the stevedore's subsequent failure to take appropriate precautions in the course of the operation that created the danger.

Id. at 1386.[10] *Taylor* is clearly distinguishable from the present case because there the stevedore-employer's own subsequent negligence created the hazard; here, it is the vessel's and the foreign stevedore's that is allegedly the cause. For the purpose of the case before us, both parties agree that the off-loading stevedore was not negligent in performing its cargo operations. Because it is undisputed for purposes of this appeal that the cargo was stowed negligently before the vessel was turned over to the off-loading stevedore, *Turner* and not *Taylor* is controlling.

[10]In *Taylor* we also rejected the longshoreworker's allegations that the vessel breached its post-turn over duties of intervention, active involvement, and control—duties not at issue here.

B. *A Vessel is Not Relieved as a Matter of Law From its Duty to Turn Over a Safe Cargo Stow Merely Because The Hazardous Condition is Open and Obvious.*

Turner establishes the proposition that the turn over duties of safe condition and of warning encompass *concealed* dangers in a cargo stow.[11] The remaining question is whether the fact that the defective condition of the cargo was open and obvious warrants a different result. The district court concluded that it did, and refused to allow Riggs' claim to go to trial. While Riggs agrees with the district judge that the turn over duty to *warn* applies only to hidden dangers, *see, e.g., De Los Santos*, 451 U.S. at 167; *Torres v. Johnson Lines*, 932 F.2d 748, 750 (9th Cir. 1991), he contends that the court erred in holding that the turn over duty of *safe condition* is similarly restricted.

[3] As we noted in our discussion of *Turner*, *supra* at 12715, *all* of the considerations on which we relied in holding that a vessel can be liable for concealed cargo defects are equally applicable in the case of open and obvious defects. The rationale underlying *Turner* simply does not permit the distinction suggested by the vessel. Moreover, we have explicitly held that the obviousness of a non-cargo defect does not absolve the vessel of its duty to turn over the ship in a safe condition—a condition under which expert and experienced stevedores can operate safely. *Martinez*, 903 F.2d at 609-10. In *Martinez*, we expressly held that an *open and obvious hazard* may be unreasonably dangerous and therefore constitute a breach of the turn over duty of safe condition. *Id.* In doing

[11]Fifth and Eleventh Circuit law is in accord with our own. E.g. *Lemon v. Bank Lines Ltd.*, 656 F.2d 110, 116 (5th Cir. Unit A. Sep. 1981); *Spence v. Mariehamns R/S*, 766 F.2d 1504, 1507 (11th Cir. 1985) (per curiam). The Third Circuit takes the contrary position. *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987) (rejecting *Turner*), *cert. denied*, 486 U.S. 1007 (1988). We cited *Lemon* with approval in *Ollstead*, 738 F.2d at 1051.

so we rejected the argument that the duty of safe condition does not extend as a matter of law to open and obvious defects — at least insofar as the vessel and its equipment are concerned.[12]

[4] The vessel argues that the rule set forth in *Martinez* is limited to the ship and its equipment and that the duty of safe condition does not apply to "open and obvious" defective cargo stows. We disagree. We can think of no sound reason for drawing such a distinction in the case of cargo stows only.[13] The sensible principle *Martinez* enunciates is that a vessel's failure to "correct" an open and obvious defect may constitute unreasonable conduct leading to the imposition of liability. That principle has equal force with respect to hazards in the stowage and hazards occurring elsewhere on the vessel. Moreover, given that under *Turner* vessels already have a duty to supervise the on-loading operations of foreign stevedores to avoid non-obvious cargo defects, there would seem to be little extra burden in requiring them to be alert at the same time to the creation of cargo hazards that are open and obvious.

The vessel suggests that in the case of obvious dangers the longshoreworkers have the opportunity to make a conscious decision to refuse to unload or bring the defects to the attention of the stevedore or vessel. However, this argument is foreclosed by the fact that neither assumption of the risk nor

[12]As we noted earlier, *De Los Santos* expressly limits the duty to warn to hidden defects but does not place a similar restriction on the duty of safe condition. *See* 451 U.S. at 167. Other courts have recognized this distinction and allowed for actions for injuries caused by open and obvious defects under the duty of safe condition but not under the duty to warn. *See Woods v. Sammisa Co. Ltd.*, 873 F.2d 842, 852 & n.13 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 853 (1990); *see also Spence v. Mariehamns R/S*, 766 F.2d 1504, 1507 (11th Cir. 1985) (analyzing hidden versus obvious only as to the duty to warn).

[13]While it is true that *Martinez* does not refer to cargo, there is no reason that it should have done so since the case involved a defective ladder.

contributory negligence is a defense under the LHWCA. *De Los Santos*, 451 U.S. at 165 n.13. As the *De Los Santos* Court stated, a vessel may not defend a suit brought against it under section 905(b) on the ground that the injured longshoreworker should have refused to continue working in the face of an obviously dangerous condition. *Id.* at 176 n.22.

[5] For the foregoing reasons, we hold that a vessel has a duty to take the necessary steps to protect longshoreworkers against open and obvious cargo defects and not just concealed ones.[14] Our holding is in accord with the law of the Fifth Circuit on this question. *Woods v. Sammisa Co. Ltd.*, 873 F.2d 842, 848, 850 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 853 (1990); *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299-300 (5th Cir. 1984). As noted earlier, the Third Circuit takes the position that the turn over duty of safe condition does not encompass *any* cargo-stow defects, whether hidden or obvious. No circuit, however, has adopted a rule similar to that urged by the vessel — that a duty exists as to concealed cargo defects but not as to open and obvious ones. We see no reason to create further confusion in this already complicated area of the law by drawing such an untenable and artificial distinction. Therefore, we join the Fifth Circuit in holding that the duty of safe turn over encompasses open and obvious, as well as concealed cargo hazards.

[14]Of course, a plaintiff in a particular case may fail to produce at trial sufficient evidence of an unreasonable danger to support a finding of a *breach* of the turn over duty. *See Ludwig v. Pan Ocean Shipping Co., Ltd.*, 941 F.2d 849, 851-52 (9th Cir. 1991) (per curiam); *Bjaranson*, 873 F.2d at 1208-09. Because "certain dangers that may be hazardous to unskilled persons need not be remedied if an expert and experienced stevedore could safely work around them," *Torres*, 932 F.2d at 751 (internal quotation omitted), it may well be that a particular hazard that is open and obvious may not constitute an unreasonable danger to longshoreworkers. However, that factual issue is separate from the legal question whether there exists a duty to turn over a vessel that does not contain any unreasonably dangerous defects, cargo, or otherwise, open or concealed.

IV. *Conclusion*

Turner holds that the turn over duty of safe condition extends to concealed cargo defects. *Martinez* holds that that duty applies to open and obvious equipment (and vessel) hazards, as well as to concealed ones. We now complete the circle. Taken together, *Turner* and *Martinez* lead directly and inexorably to the conclusion that a vessel's turn over duty of safe condition extends to protecting against open and obvious cargo hazards. Accordingly, the judgment of the district court is **REVERSED** and the case **REMANDED** for further proceedings consistent with this opinion.[15]

REVERSED and REMANDED.

RYMER, Circuit Judge, concurring:

I concur because the reasoning of *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), which holds that a vessel has the duty to protect longshoremen against concealed conditions created by a foreign stevedore, which the vessel could have corrected or warned of, leads inexorably to the conclusion that the vessel has a duty of care with respect to cargo conditions whether the dangers are concealed or not. I write separately to note that until now, the turn over duty has focused on the character of the ship and its equipment, not on the condition of the cargo. *See, e.g., Ludwig v. Pan Ocean Shipping Co.*, 941 F.2d 849 (9th Cir. 1991) (duty to have ship and its equipment safe for stevedore operations); *Taylor v. Moram Agencies*, 739

[15]The vessel argues that the award of summary judgment in its favor can be upheld on the basis that Riggs was hired to correct a dangerous stow and that under our decision in *Peters v. Titan Navigation Co.*, 857 F.2d 1342, 1344-45 (9th Cir. 1988), a repairman has no right to recover for injuries caused by the very condition he was hired to fix. The district court properly rejected this theory under the facts of this case.

F.2d 1384 (9th Cir. 1984) (vessel not liable for hazards which develop as a result of cargo operations). By the same token, the duty to warn has existed only with regard to hidden or concealed dangers. *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 415 U.S. 156 (1981); *Turner*, 651 F.2d at 1304. By imposing a turn over duty of care to protect stevedores from poor cargo conditions, we are exposing the shipowner to liability equally for lack of reasonable care as to the vessel or the vessel's equipment, and as to the condition of the cargo (at least when stowed by a foreign stevedore). It is unclear that this squares with the restrictive rules of liability of shipowners to stevedores envisioned by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), or with the scope of a shipowner's duties recognized in *De Los Santos*. In any case, should *Turner* have led us astray, either the Congress or the Court can set us straight.[1]

[1]Our decision aligns the Ninth Circuit with the Fifth, but the Third Circuit is to the contrary. *Contrast Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. Sept. 1981) (vessel liable for open and obvious defect in cargo storage) *with Deer v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987) (vessel not responsible for open and obvious cargo storage hazards created by foreign stevedore), *cert. denied*, 486 U.S. 1007 (1988).

Excerpt from testimony of
Captain Daniel Cafena Campos

Q. Did you ever buy plastic for putting on decks in the course of -- for use in stowing cargo?

A. Yes, but to protect another type of cargo that would not be cocoa beans?

Q. What kind of cargo?

A. Drums of corrosive chemicals.

. . . .

Q. Is any cargo loaded in Guayaquil other than cocoa beans?

A. Bananas.

. . . .

Q. Have you ever seen a stevedore loading -- stevedore use plastic in the loading of cargo --

A. No.

Q. -- at all or just underneath cargo?

A. In this case, I have never seen a stevedore use plastic when loading cocoa beans. The ship mate would have ordered him to stop it immediately.

Q. Okay. We'll get to that in a second, captain. Have you ever seen plastic used in connection with the loading of other cargo on board a ship?

A. Affirmative.

Q. How about on board the PRESIDENTE IBANEZ?

A. Yes. But carrying, for example, in Houston, corrosive drums. IMO cargo.

. . . .

Q. Now, you testified that the longshoremen made the decision to put paper and wood underneath the cocoa beans?

A. Affirmative.

Q. Isn't it correct that if they did not do that, you would require them to do that?

A. They have to do it.

Q. So the ship requires them to do that?

A. The stevedores have to fulfill their jobs. If not, the agency would throw them out.

Q. But they do not have the authority to decide not to put the wood or paper under the cocoa beans, do they?

A. They have the decision to do it.

. . . .

Q. Let me rephrase the question. When you stated before that the longshoremen made the decision to put wood and paper under the cocoa beans, by that do you mean that they also had the authority to make the decision not to place wood and paper under cocoa beans?

A. No. I don't believe they had it.

No. 93-670 (4)

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States
October Term, 1993

ALBERT HOWLETT,

Petitioner,

vs.

BIRKDALE SHIPPING CO., S.A.,

Respondent.

On Writ of Certiorari To The
United States Court of Appeals
for the Third Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 28, 1993
CERTIORARI GRANTED JANUARY 10, 1994

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RELEVANT DOCKET ENTRIES

Howlett v. Birkdale Shipping Co., et al.
United States Court of Appeals
for the Third Circuit
Docket No: 92-2043

12/08/92	CIVIL CASE DOCKETED. Notice filed by Albert Howlett.
12/16/92	(POSITIVE) DISCLOSURE STATEMENT on behalf of Birkdale Shipping Co and Empresa Maritima, advising: Birkdale Shipping Co., S.A. is a Subsidiary of Empresa Maritima, S.A., which is a wholly owned subsidiary of the Government of Chile.
01/19/93	BRIEF on behalf of Appellant Albert Howlett, Pages 41, Copies: 10, Delivered by mail, filed. Certificate of service date 1/19/93.
01/19/93	APPENDIX on behalf of Appellant Albert Howlett, Copies: 4, Volumes: 1, Delivered by mail, filed. Certificate of service date 1/19/93.
02/18/93	BRIEF on behalf of Appellee Birkdale Shipping Co, Appellee Empresa Maritima, Pages: 40, Copies: 10, Delivered by mail, filed. Certificate of Service date 2/18/93.
03/04/93	REPLY BRIEF on behalf of Appellant Albert Howlett, Copies: 10, Delivered by mail, filed. Certificate of service date 3/4/93.
06/21/93	ARGUED 6/21/93 Panel: Stapleton, Mansmann and Hutchinson, Circuit Judges.

06/30/93	JUDGMENT-ORDER (Stapleton, Authorizing Judge, Mansmann and Hutchinson, Circuit Judges), AFFIRMED. Costs taxed against appellant, filed.
07/14/93	PETITION by Appellant for rehearing in banc. Certificate of service date 7/14/93, filed.
07/30/93	ORDER filed (Sloviter, Chief Judge, Becker, Stapleton, Authorizing Judge, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, Alito, Roth, Lewis, Circuit Judges) denying petition for in banc rehearing by Appellant Albert Howlett.
08/09/93	MANDATE ISSUED, filed.
11/05/93	Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellant Albert Howlett. Filed in the Supreme Court on 10/28/93 at Supreme Ct. case number: 93-670.
01/14/94	U.S. Supreme Court order date 1/10/94 at S.C. number: 93-670, granting petition for writ of certiorari by Appellant Albert Howlett LIMITED to Question 1 presented by the petition, filed.

RELEVANT DOCKET ENTRIES

Albert Howlett v. Birkdale Shipping Co., S.A.
United States District Court, Eastern District of Pennsylvania
Docket No: 91-CV-7978

12/04/92	1	Complaint
01/31/92	4	Answer to Complaint by DEFENDANT BIRKDALE SHIP CO, Certificate of Service.
07/22/92	18	MOTION BY DEFENDANT BIRKDALE SHIP CO FOR SUMMARY JUDGMENT, MEMORANDUM, CERTIFICATE OF SERVICE.
08/10/92	20	Response by PLAINTIFF ALBERT HOWLETT to MOTION FOR SUMMARY JUDGMENT, Memorandum, Certificate of Service.
08/20/92	22	Reply Brief by DEFENDANT BIRKDALE SHIP CO in support of their MOTION FOR SUMMARY JUDGMENT, Certificate of Service.
10/01/92	24	MEMORANDUM AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT (SIGNED BY JUDGE JAMES M. KELLY) 10/1/92 ENTERED AND COPIES MAILED.
10/09/92	26	MOTION BY PLAINTIFF ALBERT HOWLETT FOR REARGUMENT, MEMORANDUM, CERTIFICATE OF SERVICE.
10/22/92	27	Response by DEFENDANT BIRKDALE SHIP CO to MOTION FOR REARGUMENT, Certificate of Service.

11/02/92 28 Reply by PLAINTIFF ALBERT HOWLETT to response to MOTION FOR REARGUMENT, Certificate of Service.

11/23/92 30 MEMORANDUM & ORDER THAT PLFF'S MOTION FOR REARGUMENT IS DENIED. (SIGNED BY JUDGE JAMES M. KELLY) 11/24/92 ENTERED AND COPIES MAILED.

12/03/92 31 Notice of Appeal by PLAINTIFF ALBERT HOWLETT from the order entered 10/1/92 granting deft's motion summary judgment and judgment order 10/1/92 and order entered 11/23/92.

Excerpts from Deposition of Albert Howlett

[Page 4]

Q. Can you state your full name.

A. Albert Joseph Howlett

* * * * *

[Page 9]

Q. Do you recall the name of the ship your accident occurred on?

A. PRESIDENTE -- I forget. PRESIDENTE something.

Q. The date of your accident, do you recall it to be July 28, 1989?

A. Yes.

* * * * *

[Page 12]

Q. Do you recall what time you got to work that day?

A. It was about quarter of 8:00 in the morning.

Q. Do you recall what time you boarded the vessel?

A. After 9:00. Some time after 9:00.

* * * * *

Q. When you boarded the vessel, where did you go to immediately? Where did you first work?

A. Number 2 hatch.

* * * * *

Q. Do you recall how many people were working in the hatch?

* * * * *

A. Down in the hold of the ship was four.

* * * * *

[Page 14]

Q. Can you tell me what cargo was in the hold at that time and describe it for me?

A. On the after end you had containers and on the forward end you had cocoa beans.

Q. Were there any gaps in the cargo that you could see the skin of the hatch?

A. No.

Q. When you went in there, what did you unload first?

A. Cocoa beans, pre-slung cocoa beans.

Q. What time did your accident occur?

A. I think it was about 10 of 10:00.

Q. So you were in that hatch for less than an hour?

A. Yes.

* * * * *

[Page 15]

Q. At that time before your accident how many drafts were taken out of the hold?

MR. SOVEL: May I interject something. When you take out the pre-slung units, how many units would go out as a draft?

THE WITNESS: Four would go out as a draft. Four makes a draft up.

BY MR. ZIPFEL:

Q. Four hooked up at once makes a draft.

A. I guess about four drafts, four to five drafts.

* * * * *

Q. Did you assist with hooking up those drafts?

A. Yes.

Q. And what were you using to hook them up?

A. It's a spreader. It's a spreader that has four hooks that dangle. Each man gets four hooks to hook in. You have four corners. You hook up four corners, two, three, four, and each man does the same thing.

Q. Each man hooks onto one unit?

[Page 16]

A. Yes, each man hooks up four hooks onto the corners of each.

* * * * *

Q. Did any of those four drafts when they were lifted expose the skin of the hatch?

A. No.

Q. Were you working on top of cargo while you were hooking up those drafts?

A. Which drafts?

Q. The four before your accident.

A. Yes.

* * * * *

[Page 17]

Q. . . . . And what did you have on your feet at that day?

A. Work boots.

* * * * *

Q. Had you ever discharged this type of cargo before?

A. Yes.

Q. And approximately how often?

A. Numerous times.

Q. More than 20?

A. Yes, I imagine more than 20, yes.

Q. More than a hundred?

A. Probably less than a hundred.

Q. Between the time that you entered the number 2 hatch and the time of your accident, did you register any complaints about any condition in the hold?

A. No

[Page 18]

Q. Did you hear anyone else register any complaints?

A. No.

Q. At any time from when you entered the hatch till the time of your accident did you see or have any contact with any officers or crew members?

A. No.

Q. Can you tell me how your accident occurred.

A. I was working cocoa beans in number 2 hatch. We took out about four or five drafts of pre-slung. We were taking the first draft off skin. When we took the first draft off skin, I stepped down to the hold, hit the plastic and went down.

Q. When this draft was being lifted right before your accident, where were you standing?

A. I was facing the after end. I was facing the after end. I would be on the offshore side, on the offshore side.

* * * * *

Q. Were you standing on top of anything?

A. Yes, cocoa beans.

Q. Approximately how high from the skin would you have been standing?

[Page 19]

A. Roughly about 3 foot.

Excerpts from Deposition of Albert Howlett

Q. Were you standing on a draft that would be taken out later?

A. Yes.

Q. And they're only 3 feet high?

A. Yes, about 3 feet high.

Q. Was the draft out of the hold or was it dangling in the air at the time of your accident?

A. It was dangling in the air.

Q. And where were you going to at the time of your accident?

A. The ship had no wing. It didn't have any wings there. So with the containers on the after end there was a little walkway there. There was a little walkway for the lids, you know, for the lids. On the after end the container came up, so the lids was open -- the lid was open. So we had to step up and on the ledge over here. See, there was no wings there to get out of the hold, so you walk to the side around the containers.

Q. You were getting out of the way so --

A. Yes. We walked to the after end to get out.

* * * * *

[Page 24]

Q. The plastic that you mentioned, can you describe where that was.

Excerpts from Deposition of Albert Howlett

A. It was on the skin of the ship, on the deck of the ship.

Q. Can you describe the plastic for me.

A. A thick piece of plastic, that's all.

Q. Approximately how big a piece of plastic was it?

A. The only area showing was the area I took the four out of.

Q. The only area of the skin showing.

A. Yes. You know, well, it went underneath. You can see that it went underneath, but that was it.

Q. So there was plastic covering the entire skin in that area; is that correct?

A. In the area that I fell in, yes.

Q. . . . . So, when that draft was lifted out, am I correct that you couldn't touch the skin within that area where the load had been located?

[Page 25]

A. Without hitting plastic.

Q. So plastic covered the entire area.

A. Yes.

Q. Was it clear plastic or did it have a color to it?

Excerpts from Deposition of Albert Howlett

A. It was a clear plastic. It was dirty. You know, it was cocoa beans.

Q. You said you worked this type of cargo before. Had you ever seen plastic used on the skin of a hatch below cocoa beans like that before?

A. Never.

* * * * *

Q. Before you stepped down from the cocoa beans to the plastic, were you aware that there was plastic there?

[Page 26]

A. No.

Q. When you stepped down from the cocoa beans to the plastic, where were your eyes directed?

A. Where was my eyes directed?

On the draft.

Q. Did you look down at all before you stepped down into --

A. Yes. As I was coming down, yes.

* * * * *

Q. Before you stepped from the cocoa beans down into the space where this draft had been located, at any time did you direct your eyes to what would have been normally the skin?

A. Yes.

Q. When you did that, did you observe the plastic?

Excerpts from Deposition of Albert Howlett

A. No.

Q. Why did you not see the plastic?

A. Well, it was dirty. I guess I really didn't think it was plastic. I really didn't think it was plastic.

Q. What did you think it was?

[Page 27]

A. I thought it was paper.

Q. I don't think I've got a full appreciation of what the plastic looked like. You said it was dirty. Can you describe it any better than that?

A. It was dirty and there was debris on it, you know.

Q. Was it a clear plastic or was it a dark plastic?

A. I guess a dirty piece of plastic. I guess clear. I guess clear.

Q. When you say "dirty," what --

A. From the cocoa beans, just the dirt.

Q. Was there dust on it or was it just dirt?

A. Yes, it was dust, dirt, cocoa beans, you know, the whole bit.

Q. Was it dirty in one area or the entire thing?

Excerpts from Deposition of Albert Howlett

A. It was dirty all over.

Q. Approximately how thick was the plastic?

A. Thin. You know, it's not that thick. Less than a quarter of an inch I know that.

Q. You said you thought it was paper.

A. Yes.

Q. Had you ever seen paper used on the skin of a hatch below cocoa beans before?

[Page 28]

A. All the time.

Q. So is that a normal practice for shipping cocoa beans?

A. Well, you have plywood, you have paper, most of the time you have plywood and paper, you would use dunnage and you'll put paper over the dunnage. But mostly it's plywood or papers.

Q. Are you saying normally there would be plywood and paper?

A. Yes, or something it's not. Normally it's plywood or paper, yes.

Q. Do you know what the paper is there for, what the purpose is for?

A. Yes.

Excerpts from Deposition of Albert Howlett

Q. Can you tell me.

A. Condensation.

Q. When you stepped down from the cocoa beans, did you immediately fall or did you take any steps?

A. I immediately fell.

Q. Which foot came into contact with the plastic?

A. The left.

Q. And did you fall to the skin?

[Page 29]

A. Yes.

Q. And what part of your body hit the plastic or skin first?

A. My left side.

* * * * *

Q. Did you try to catch yourself as you fell?

A. There was a container in front, you know, on the after end. And as I went down, I just put my hand up, and my left hand got caught underneath my body and bent my wrist back underneath the body.

* * * * *

[Page 30]

Q. When you went down, you said you landed on your left side?

A. Yes.

Excerpts from Deposition of Albert Howlett

Q. And your left hand or wrist, what happened to that?

A. It got caught underneath my body as I fell on it.

* * * * *

[Page 39]

Q. Was there any problem with lighting in the hold at the time of your accident?

A. Oh, yes. You have four drafts going out, you have three high containers on deck. Yes, it's pretty dark.

Q. Was it daylight?

A. Yes.

* * * * *

Q. At any time before you entered the hatch or before your accident did anyone mention the fact that there was plastic underneath the cocoa beans?

A. No.

Q. The plastic, was it damp or wet at all that you recall?

A. No.

Q. Were your clothes damp or wet when you got up?

A. No.

Q. You said you slipped on the plastic. What actually caused you to slip?

[Page 40]

A. I imagine the plastic itself or the debris on top of it. I

Excerpts from Deposition of Albert Howlett

don't know.

Q. You say "debris." Can you describe the debris.

A. You have cocoa beans, you have pieces of cocoa beans crumbled, you know, dust, dirt, rust, you know.

Q. And some of that was present on the plastic?

A. Yes.

Q. Normally, when you're unloading cocoa beans at other times, would thee be dust and rust and debris on the paper?

A. Yes.

Q. So that's a normal condition?

A. Yes.

* * * * *

[Page 43]

Q. So the area that was exposed was approximately 4 feet by 5 feet?

* * * * *

A. It would be roughly about 8 foot.

Q. Which way? 8 foot square?

A. 8 foot square.

Q. Do you know what actually caused you to fall?

Excerpts from Deposition of Albert Howlett

A. Yes, the plastic.

Q. Would you describe it as you slipped or you tripped?

A. I slipped.

Q. Are you saying that the plastic was slippery in some ways?

A. Yes.

Q. And would you say the plastic was more slippery than if paper was present there?

A. Definitely, yes.

Q. And why would it be more slippery than paper?

A. Because the paper will grab, it will grab the metal deck. You know, it will hold. Where if there's plywood underneath the paper, it will just hold that much better. The most that would happen is the paper would rip if you stepped on it, where the plastic won't -- you know, it doesn't give.

* * * * *

[Page 44]

Q. You've said you've never seen plastic used like that in a hold where cocoa beans are stowed. Have you ever heard of plastic being used in that situation?

A. No.

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

[Page 3]

Q. Would you state your full name please.

* * * * *

A. In my country I am referred to as Captain Cafena. Captain Caınpos, but here my name would be Cafena.

[Page 4]

Q. Cafena, thank you. Captain Cafena, back in July of 1989, were you employed by Empremar?

A. Affirmative, yes.

Q. In what position?

A. As a captain.

Q. On what ship?

A. PRESIDENTE IBANEZ.

* * * * *

[Page 6]

Q. Referring to the No. 2 Hold, do you recall whether there were cocoa beans loaded in the No. 2 Hold to the ship on that voyage?

[Page 7]

A. Not exactly.

Q. If cocoa beans were loaded on the ship on that voyage, at what port would they have been loaded, if you know?

A. I would say in Guayaquil.

Q. And what country is Guayaquil?

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

A. In Ecuador.

* * * * *

[Page 8]

Q. When in Guayaquil, who does the loading of the cargo? In Guayaquil, who does the loading of the cargo?

A. The stevedores.

* * * * *

Q. Who would have made the determination as to where on the ship the cocoa beans would be loaded?

[Page 9]

A. Who makes the decision to load the cargo?

Q. No. Who determines -- who makes up the stowage plan to determine where cargo will be loaded on the ship?

A. The pilot -- the chief mate.

* * * * *

Q. Do you review his stowage plan?

A. Always.

Q. When you arrived in Guayaquil, did you give the stowage plan to the agent or to the stevedore or who?

A. The chief mate would give it to the agency.

Q. When cocoa beans are loaded on the ship in Guayaquil, is paper or wood or plastic put on the deck on which the cocoa beans are put on top of?

* * * * *

[Page 10]

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

A. Always paper.

Q. Have you ever seen plastic put on the deck?

A. In any other occasion?

Q. On any occasion with loading the cocoa beans.

A. Never with cocoa beans. Never with cocoa beans. It is not permitted.

Q. Why is it not permitted?

A. Because the cocoa beans are a very delicate cargo, and they could breathe, and the plastic would -- they are very humid, moist, and the plastic could cause more moisture.

Q. Who makes the decision as to what is put on the deck before the cocoa beans are stowed?

A. The stevedores.

Q. How do you know that?

A. Because it has always been that way. They should know what they have to do, and that is their job.

Q. Now, does your chief mate watch the loading of the cargo?

A. I would say yes, that he would do it, but he can't be attentive to everything that is happening.

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

[Page 11]

Q. Would he be responsible to make sure they put paper on the deck and not plastic?

* * * * *

A. Yes.

Q. If plastic were placed on the deck, would it have been his duty to stop it and order it removed?

* * * * *

A. He would have to object immediately if he saw they were putting plastic when they were loading on the cocoa beans, of course, yes.

* * * * *

Q. What is your practice with respect to how many men from the ship's crew are on deck of the vessel watching the loading of cargo when the ship is in Guayaquil?

[Page 12]

A. Normally be three sailors and one guard, an official.

* * * * *

Q. Is it your practice to assign one seaman to watch each hold?

A. No, it's not the practice to assign one man for each cargo. Normally they are watching all the cargo on the ship.

Q. How many holds are on the ship or on the PRESIDENTE IBANEZ?

CAPTAIN CAFENA: Cuatro.

THE INTERPRETER: Okay. Four.

Q. So that would it be fair to say -- strike that. You have

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

three men, three seaman and a mate, an officer -- you have three seaman and an officer assigned to watch the four cargo holds?

* * * * *

[Page 13]

A. Yes. Because many strangers or strange people could enter. There could be people who were trying to stow away drugs or stowaways.

Q. And those men will move from hold to hold during the course of the whole cargo operation watching what is happening?

A. Affirmative. Yes.

Q. And that would start from the beginning -- from the time the longshoremen come on the ship until the longshoreman finish?

A. Yes.

Q. So that if sheets of plastic were being put on the deck for the -- before the cargo -- the cocoa beans were being loaded, they should be able to see that plastic being placed on the deck and stop it?

A. Yes.

* * * * *

[Page 14]

Q. Let me rephrase the question. When the ship was in Guayaquil in July of 1989, whatever the date, would the practice that you just described have been the practice that was followed on the ship?

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

* * * * *

A. The practice is this. To take care of the cargo and to make sure that no strange people come on the ship. Strangers.

Q. Would that have been the practice, to watch the cargo being loaded on the ship in Guayaquil, in July of 1989?

* * * * *

[Page 15]

A. Yes.

Q. So that if plastic was placed on the deck under the cocoa beans in Guayaquil in July of 1989, one of the crew members should have seen it?

* * * * *

A. Affirmative. And he would have advised me or one of the ship mates.

MR. WRIGHT: Chief mate.

THE INTERPRETER: Chief Mate. I'm sorry.

Q. And if you had been advised, you would have directed that it be removed?

A. Immediately.

* * * * *

Q. When the ship was in Philadelphia for discharging cargo -- or strike that. When the ship was in Philadelphia, did you have members of your crew on the deck to watch the work of the stevedores?

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

A. Yes, as it is the practice to have people.

Q. Was your practice in Philadelphia the same as your practice in Guayaquil?

* * * * *

[Page 16]

Q. In loading, unloading cocoa beans in Philadelphia in July of 1989, how many members of the crew would you have on deck -- did you have on deck observing the unloading operation?

[Page 17]

A. I had three sailors and one officer, watching not just the operation, but taking care of the whole ship.

Q. Going back to the loading of cocoa beans in Guayaquil, if plastic was placed on the deck underneath the cocoa beans, who would have ordered that plastic, if you know?

A. Who would have ordered to put the plastic?

Q. No. Yes first.

A. The stevedores.

Q. Who would have purchased the plastic?

A. The ship would buy the plastic. We purchase all of the materials for the operation. The plastic, the wood.

Q. Do you do the purchasing or does the agent do the purchasing?

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

A. The ship directly, but not in Guayaquil. We would buy it in the United States, because it is cheaper.

Q. Did you ever buy plastic for putting on decks in the course of -- for use in stowing cargo?

A. Yes, but to protect another type of cargo that would not be cocoa beans.

[Page 18]

Q. What kind of cargo?

A. Drums of corrosive chemicals.

Q. What kind of plastic do you buy?

A. Only the name would be polyprop --

MR. WRIGHT: Polypropylene.

Q. Does it come in rolls or sheets or what?

A. In rolls.

Q. How long are the rolls?

A. Thirty meters. Thirty, thirty-five meters.

Q. How wide is the roll?

A. About two meters.

* * * * *

Q. Where are the rolls of plastic kept on the ship?

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

A. The cuarto maestre.

* * * * *

[Page 19]

Q. Well, it's kept in a locker?

A. In a locker locked with a key. As the word says, locker.

Q. Would that be the bosun's locker?

A. Yes.

Q. He would be the one that would have the key to the locker?

A. Him and the chief mate.

* * * * *

Q. In stowing cocoa beans, was it the practice on the IBANEZ to always use paper on the deck?

A. First wood and then paper.

Q. Why wood and then paper?

A. So the paper would have a better resistance. If not, it would break.

[Page 20]

Q. Why do you put anything on the deck? Let me rephrase the question. Why do you put wood or paper on the deck underneath the cocoa beans?

A. Because that is the way that we should stow the cocoa beans.

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

Q. Do you know why you do it?

A. Why the stevedores?

Q. Yeah. Why paper is put on the deck regardless of who does it?

A. The stevedores put it, because that is the way to stow the beans.

Q. Do you know if the purpose of it is to protect the beans from coming in contact with moisture from the deck?

A. The paper is to protect against the moisture from the deck, exactly. Precisely.

Q. Who purchases the paper that is used on stowing cocoa beans in Guayaquil?

A. The boat has it. The boat purchases it the same as the plastic, in the United States.

[Page 21]

Q. Now, do they also use wood under the paper in Guayaquil in stowing cocoa beans?

A. Yes.

Q. And who purchases the wood?

A. Also the boat. That we would buy in Valparaiso, in Chili.

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

Q. Where is the paper stored on the ship before you get to Guayaquil?

A. In the same quartermaster.

Q. Locker. Same quartermaster locker?

CAPTAIN CAFENA: The same.

A. The same locker by the quartermaster.

Q. How about the wood?

A. The wood usually comes broken down in -- in the 'tween deck. They put it there so it will be protected from the rain.

Q. When the longshoremen in Guayaquil come aboard the ship and they need paper, how do they go about getting it?

A. They ask for it from the quartermaster or from the chief pilot, who would have it in his locker.

[Page 22]

MR. SOVEL: By chief pilot, does he mean chief mate?

CAPTAIN CAFENA: Chief mate.

* * * * *

Q. How about when they need the wood for storing cocoa beans, would they have to ask for it or just take it?

A. No. They always ask for it from the guard or from the

Excerpts from Discovery Deposition of Captain Daniel Cafena Campos

chief mate or the quartermaster.

Q. Is it correct that in Guayaquil the longshoremen do not bring on their own paper or own wood?

A. It's correct.

Q. And whatever they use -- is it correct that whatever they use under the cargo, they have to get from the ship?

* * * * *

[Page 23]

A. Affirmative.

* * * * *

Q. Is any cargo loaded in Guayaquil other than cocoa beans?

A. Bananas.

Excerpts from De Bene Esse Deposition of Captain Daniel Cafena Campos

[Page 5]

Q. Captain does that stowage plan indicate where dunnage or other similar materials, such as paper or plastic or whatever may be used, does it indicate where that material is to be placed within the cargo or under or over the cargo for that matter?

* * * * *

[Page 6]

A. (Captain Cafena) No.

* * * * *

[Page 7]

Excerpts from De Bene Esse Deposition of Captain Daniel Cafena Campos

Q. Who loads the cocoa beans -- strike that. Who loaded the cocoa beans in Guayaquil?

A. The Stevedores.

Q. Assuming that cocoa beans have been loaded on board the PRESIDENTE IBANEZ for the voyage in question, and those cocoa beans had been loaded in Guayaquil, who would have loaded those cocoa beans?

A. The stevedores.

Q. And, captain, who made the decisions concerning what, if anything, would be placed underneath that cargo of cocoa beans?

[Page 8]

A. The stevedores.

Q. . . . . Captain, have you ever observed cargo of cocoa beans loaded -- being loaded by stevedores?

A. Yes. By the stevedores, yes.

Q. And what, if anything, is normally placed underneath those -- that cargo of cocoa beans?

* * * * *

A. They put what they are supposed to put in this case, which would be wood and then paper.

Q. And then the cocoa beans are placed on top of the paper?

A. Always on the paper.

Excerpts from De Bene Esse Deposition of Captain Daniel Cafena Campos

Q. Have you ever seen a stevedore loading -- stevedore use plastic in the loading of cargo --

A. No.

Q. -- at all or just underneath the cargo?

[Page 9]

A. In this case, I have never seen a stevedore use plastic when loading cocoa beans. The ship mate would have ordered him to stop it immediately.

Q. Okay. We'll get to that in a second, captain. Have you ever seen plastic used in connection with the loading of other cargo on board a ship?

A. Affirmative.

Q. How about on board the PRESIDENTE IBANEZ?

A. Yes. But carrying, for example, in Houston, corrosive drums. IMO cargo.

* * * * *

Q. Now, captain, at any time during loading of cocoa beans in Guayaquil, were you ever aware that the stevedore was using plastic underneath the cocoa beans?

MR. SOVEL: And by that you mean him personally?

MR. WRIGHT: Yes.

A. Never.

* * * * *

Excerpts from De Bene Esse Deposition of Captain Daniel Cafena Campos

[Page 10]

Q. Captain, in 1989, did you have a practice for reporting problems that your officers or crew members might observe during the course of loading on board the PRESIDENTE IBANEZ?

A. I always had.

Q. And what was that practice?

A. To observe, to make sure that there would be no robberies and to protect the ship.

Q. What would be the practice if your officers or crew members observed a problem in the manner in which the cargo was being loaded?

A. They would advise me immediately. That is a practice.

Q. And if a stevedore in Guayaquil had placed plastic down on one of the 'tween decks on the PRESIDENTE IBANEZ and then placed a cargo consisting of cocoa beans on top of that plastic, is that something that would have been reported to you?

* * * * *

[Page 11]

A. Immediately.

Q. And why would that have -- why would that be something that would be reported to you?

* * * * *

A. Because it's not usual -- because you should not be plastic

with the cocoa beans.

Q. And, captain, why is plastic not ordinarily used in the loading of cocoa beans?

A. Because the plastic produces moisture and cocoa beans go bad with the moisture.

Q. Are you aware of any other problems arising from the use of plastic with cocoa beans?

A. Apart from the moisture, no.

* * * * *

[Page 13]

Q. Now, you testified that the longshoremen made the decision to put paper and wood underneath the cocoa beans?

[Page 14]

A. Affirmative.

Q. Isn't it correct that if they did not do that, you would require them to do that?

* * * * *

A. They have to do it.

Q. So the ship requires them to do that?

* * * * *

A. The stevedores have to fulfill their jobs. If not, the agency would throw them out.

Q. But they do not have authority to decide not to put the wood or paper under the cocoa beans, do they?

* * * * *

A. They have the decision to do it.

Q. Well, do they have -- do they have -- can they make a decision not to do it?

A. If they did it, it would not be correct.

Q. And what would you do?

A. This case has never happened to me.

Q. Would you -- if you learned that they were not doing it, would you not tell them to do it?

* * * * *

[Page 15]

A. I would have told them.

Q. And would you not have insisted that they do it?

* * * * *

A. Normally, we don't repeat the order. If I would have told them -- I've never had a case like this happen to me.

Q. Is what you are saying that if you tell them, they will do it?

A. Possibly they would do it.

Q. But when you said they made the decision to do it, do you mean that they could also make the decision not to do it?

* * * * *

Excerpts from De Bene Esse Deposition of Captain Daniel Cafena Campos

Q. Let me rephrase the question. When you stated before that the longshoremen made the decision to put wood and paper under the cocoa beans, by that do you mean that they also had authority to make the decision not to place wood and paper under cocoa beans?

* * * * *

[Page 16]

A. No. I don't believe they had it.

Excerpts from Deposition of Raymond McMullen

[Page 5]

Q. Could you state your full name?

A. Raymond McMullen.

* * * * *

[Page 7]

Q. How long have you worked as a longshoreman?

A. About 21, 22 years steady.

* * * * *

[Page 8]

Q. What's your position now?

A. Now I am a gang foreman.

Q. How long have you been a gang foreman?

A. About 13 years.

Q. Can you tell me briefly the job description of a gang

Excerpts from Deposition of Raymond McMullen

foreman?

A. Hire the right amount of men for whatever the job calls for, and to make sure the job gets done safe and as quick as possible.

* * * * *

Q. At other times, do you also act as a ship boss?

A. Yes, I do.

* * * * *

[Page 9]

Q. Can you tell me briefly what the duties of a ship boss are?

A. Basically the same as a hatch boss, make sure all the cargo gets on and off.

* * * * *

Q. Investigating an accident involving Albert Howlett, were you present on the day this accident occurred?

A. Yes.

* * * * *

[Page 10]

Q. Do you remember what your job was that day; were you acting as a ship boss that day?

A. Yes, I was.

* * * * *

[Page 13]

Q. How did you first find out that Mr. Howlett was involved in an accident?

A. I believe he came up to me and told me that he had hurt

Excerpts from Deposition of Raymond McMullen

himself.

Q. And where were you when he told you this?

A. I believe I was on the deck.

* * * * *

Q. Did you conduct any type of investigation, talk to anyone else who was in the hold, or anything else to find out what happened?

[Page 14]

A. I just looked down the hatch and seen plastic laying on the ground. I didn't talk to no one.

Q. This is after the accident, after you talked to Mr. Howlett, you looked down in and you saw plastic?

A. Yes.

Q. At any time before Mr. Howlett told you about his accident, did you look into the hold and see plastic?

A. No.

* * * * *

[Page 15]

Q. The plastic that you saw, can you describe it for me?

A. White, clear plastic.

Q. When you looked down, how much of the skin could you see?

[Page 16]

A. Right where they took the units out from.

Excerpts from Deposition of Raymond McMullen

Q. How many units had they taken directly from the skin?

A. I believe it was four, but I am not certain.

Q. Would that be one load, or is that four separate loads?

A. That would be one load.

* * * * *

[Page 22]

Q. As ship boss, you were also responsible for overseeing what was going on in the other hatches?

A. Yes.

Q. Do you know if there was plastic used in the other hatches?

A. I don't remember.

Excerpts from Deposition of Joseph Fisher

[Page 5]

Q. State your full name.

A. Joseph Fisher.

* * * * *

[Page 9]

Q. Where did Mr. Howlett's accident occur?

A. No. 2 hatch.

Q. Were you working in the hatch at the time?

Excerpts from Deposition of Joseph Fisher

A. Yes.

* * * * *

[Page 16]

Q. Do you know what caused him to fall?

A. The plastic.

Q. Was there anything besides the plastic there that contributed to causing him to fall? Were there any objects that he tripped on, or anything like that?

A. Probably dust and dirt from the cocoa beans.

* * * * *

Q. Prior to this day, had you ever seen plastic used in a hatch where cocoa beans were stowed?

[Page 17]

A. No.

Q. After this day, did you ever see plastic used in the hatch where cocoa beans were stowed?

A. No.

Q. Do you know if plastic was used in any other hatch aboard this vessel?

A. I don't know.

Q. Did you work at any other hatch?

A. Yes.

Q. And in those hatches, were there cocoa beans.

Excerpts from Deposition of Joseph Fisher

A. I don't remember.

* * * *

[Page 18]

Q. Before Mr. Howlett jumped off the cocoa beans into the exposed area, did you at any time look at that exposed area?

A. No.

[Page 19]

Q. When did you first realize there was plastic there?

A. When Sonny was on the deck.

Q. When you looked down at the exposed area, could you see the plastic?

A. I don't understand what you mean.

Q. After Mr. Howlett fell, did you go over to that area?

A. Yes.

Q. And when you looked down, you could see Mr. Howlett on the ground?

A. Yes.

Q. When you looked at the deck area, could you see plastic?

A. Yes.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
BIRKDALE SHIPPING	:	
CO., S.A.,	:	
Defendant.	:	NO. 91-7978

MEMORANDUM

J. M. Kelly, J. **OCTOBER 1, 1992**

Presently before this court is Defendant Birkdale Shipping Co.'s motion for summary judgment pursuant to Fed. R. Civ. P. 56. This court has jurisdiction over this matter under 28 U.S.C. § 1331 and § 1332.

This action arises out of the injury to Plaintiff, Albert Howlett, while discharging pre-slung cocoa beans from the No. 2 hold of the vessel M/V Presidente Ibanez. At the time of the incident the M/V Presidente Ibanez was owned and operated by Birkdale Shipping Co., S.A.[1] Plaintiff was employed as a longshoreman by Northern Shipping Co., a stevedore operating in the Port of Philadelphia.

---

[1] The operator of this vessel on the date of the alleged injury is in dispute. This court will not deal with this issue for purposes of this motion.

The alleged accident is said to have occurred on July 28, 1989. In the hours before the accident, Plaintiff and other longshoremen were working in the tween deck of the No. 2 hatch hooking up four or five drafts of pre-slung bags of cocoa beans. While the first draft of cocoa beans were being lifted out of the hatch, plaintiff allegedly stepped down to the deck, upon which he allegedly slipped and fell.

Plaintiff contends that covering the deck was a layer of plastic. Plaintiff claims that he was not aware of the plastic and believed the deck to be covered by paper. It is customary to place paper and/or plywood under cocoa beans to protect against condensation. It is not customary to use plastic as a substitute for this purpose. Plaintiff asserts that the defendant was negligent in providing the stevedore with plastic instead of the usual paper or wood and in neglecting to warn the longshoremen that plastic was being used to protect the beans from condensation.

Defendants move for summary judgment claiming that as a matter of law they owed no duty of care to plaintiff. Defendants allege that the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), as amended in 1972, limits a shipowner's liability to acts of its own negligence and cannot be held liable for dangerous conditions arising from the acts of an independent stevedore.

Defendants claim that under Scindia Steam Navigation Ltd. v. De Los Santos 451 U.S. 156 (1981) and Derr v. Kawasaki Kisen, K.K., 835 F.2d 490 (3d Cir. 1987) a vessel owner owes no duty in supervising the work of a stevedore, nor can he be held liable for such parties acts of negligence. Furthermore, Defendant points out that while they were the source of the plastic they were not responsible for, nor were they aware, of its intended use. They also claim that even if

they were aware of the plastics intended use, this is not enough to impose liability. In order to be liable the shipowner would have to perform an act creating "an unreasonable risk of harm." Woods v. Partenreederei Ms. Yankee Clipper, 677 F. Supp. 46, 48 (D. Mass 1987). Defendant also asserts that regardless of their knowledge involving the use of the plastic, they were under no duty to warn as the condition was open and obvious.

In response Plaintiff asserts that there is sufficient evidence that Defendant had actual knowledge that the plastic was to be used in connection with the cocoa beans and that the condition was not "open and obvious", and therefore may be held liable.

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255.

While the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Therefore, the party opposing the motion must come forward with "more than a mere scintilla of evidence in its favor" and "'cannot simply reassert factually unsupported allegations contained in its pleading.'" William v. Borough of West Chester, 891 F. 2d 458, 460 (3d Cir. 1989) (citing Anderson, 477 U.S. at 249 and 325).

The Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901 et seq. defines the duty owed to longshoremen by vessels. The 1972 amendments to the Act reduced the liability of the shipowner and increased the opportunity to recover from the stevedore. Under the amendments, the shipowner could be held liable for his own negligence, but not the negligence of the stevedore. 33 U.S.C. § 905(b); Woods, 677 F. Supp. at 47.

Scindia, the leading case on the duty a shipowner owes to its stevedore, held that the "vessel owes the longshoremen a duty to exercise due care 'under the circumstances'." Woods at 47. This level of care requires the vessel to be in working order so that an experienced stevedore is able to safely perform cargo operations. Id.

In this case Plaintiff is claiming that Defendant breached the duty to warn. In order to satisfy this claim it is necessary for plaintiff to show that defendant had actual knowledge of the condition and that it was not open and obvious.

Plaintiff asserts no factual basis for the claim that the vessel had actual knowledge that the plastic was being used in stowage for the cocoa beans. Plaintiff infers knowledge since the vessel was the source of the plastic. This assertion does

not satisfy the standard of actual knowledge necessary to impose a breach of liability. As Defendant denotes, being the supplier of equipment does not necessarily imply knowledge of its intended purpose.

Secondly, Plaintiff asserts that Defendants knowledge can be found through the fact that Defendants crew were present during the loading of the cocoa beans. This assertion also does not satisfy the knowledge requirement. If it is true that the dangerous condition was apparent from the mere presence during the loading process, then it readily transpires that this was an open and obvious condition. Under Scindia, a shipowner is not liable for open and obvious conditions.

Plaintiffs have produced no evidence from which to find a genuine question of fact. Therefore, Defendant's Motion for Summary Judgment shall be GRANTED.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
BIRKDALE SHIPPING	:	
CO., S.A.,	:	
Defendant.	:	NO. 91-7978

ORDER

AND NOW, this 1st day of October, 1992, in consideration of Defendant's Motion for Summary Judgment, Plaintiff's Answer thereto, Defendant's Reply, as well as the foregoing Memorandum of Law, it is hereby ORDERED that Defendant's Motion for Summary Judgment is GRANTED.

BY THE COURT:

/s/ James McGirr Kelly

James McGirr Kelly, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
BIRKDALE SHIPPING	:	
CO., S.A.,	:	
Defendant.	:	NO. 91-7978

ORDER

Before the Honorable James McGirr Kelly

AND NOW, this 1st day of October, 1992, in accordance with the Court's Order of October 1, 1992,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of defendant Birkdale Shipping Co., S.A. and against plaintiff Albert Howlett.

BY THE COURT

ATTEST: /s/ Arlene L. Quinn

Arlene L. Quinn
Deputy Clerk

Civ 1 (8/80)

ENTERED: 10/2/92

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
BIRKDALE SHIPPING	:	
CO., S.A.,	:	
Defendant.	:	NO. 91-7978

MEMORANDUM

J. M. Kelly, J.

Presently before the court is Plaintiff Howlett's Motion for Reargument of the court's Order, dated October 1, 1992, granting Defendant Birkdale Shipping Company's Motion for Summary Judgment. For the following reasons, the motion will be denied.

Plaintiff filed a complaint against Empresa Maritima Howlett v. Empresa Maritima, 92cv4245, on July 22, 1992. This complaint was based on the same facts and circumstances as the present action. On November 10, 1992, an Order was issued by this court to consolidate the cases for all purposes.

Plaintiff Howlett does not specify what rule of Federal Civil Procedure or Local Rule of the United States District Court for the Eastern District of Pennsylvania he invokes for her motion. Nonetheless, "any kind of motion that draws into question the correctness of the district court judgment is considered to be a motion to alter or amend the judgment

under Civil Rule 59(e)." 16 Charles A. Wright & Kenneth A. Graham, Jr., Federal Practice and Procedure § 3950, at 364 n.7. The purpose of a motion for reconsideration is to correct errors of law or fact, or to present newly discovered evidence. Keene Corp. v. International Fidelity Insurance Co., 561 F.Supp. 656, 665 (N.D. Ill, 1983), aff'd, 735, F.2d 1367 (7th Cir. Ill., May 29, 1984) (No. 83-1492).

An order granting summary judgment was issued on October 1, 1992. The court found that actual knowledge could not be imputed to the vessel owner and that the accident occurred as the result of an open and obvious condition.

In support of the instant motion, Plaintiff asserts that there has been a misapplication of the law to the facts of the case. Plaintiff contests the courts' finding the condition to be open and obvious, as well as, the failure to impute actual knowledge on the vessel owner.

Plaintiff submits no new evidence in support of this motion. Additional law has been found to supports the courts findings in the original memorandum and order. See Trinidad Pimental v. Canadian Pacific Bulk Ship Service and M/V Fort Nanaimo, CV NO. G-89-162, (S.D. Tx. filed July 19, 1991). Finding the law to have been appropriately applied to the facts of the case, Plaintiff's motion for reargument shall be denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT HOWLETT,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
BIRKDALE SHIPPING	:	
CO., S.A.,	:	
Defendant.	:	NO. 91-7978

ORDER

AND NOW, this 23rd day of November, 1992, in consideration of Plaintiff's Motion for Reargument, Defendant's Reply, Plaintiff's Response, thereto, Defendant's Supplemental Brief, as well as the foregoing Memorandum of Law, it is hereby ORDERED that Plaintiff's Motion for Reargument is DENIED.

BY THE COURT:

/s/ James McGirr Kelly
James McGirr Kelly, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-2943

ALBERT HOWLETT

V.

BIRKDALE SHIPPING CO., S.A.
(D.C. Civil No. 91-07978)

ALBERT HOWLETT

V.

EMPRESA MARITIMA DEL ESTADO
(D.C. Civil No. 91-04245)

Albert Howlett,
Appellant

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action Nos. 91-07978 & 91-04245)
District Judge: Honorable James McGirr Kelly

Argued June 21, 1993

BEFORE: STAPLETON, MANSMANN and HUTCHINSON,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court dated November 24, 1992, be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/S/ Walter K. Stapleton
Circuit Judge

ATTEST:

/S/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: June 30, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-2943

ALBERT HOWLETT

V.

BIRKDALE SHIPPING CO., S.A.
(D.C. Civil No. 91-07978)

ALBERT HOWLETT

V.

EMPRESA MARITIMA DEL ESTADO
(D.C. Civil No. 91-04245)

Albert Howlett,
Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS,
Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/S/ Walter K. Stapleton
Circuit Judge

Dated: July 30, 1993

(5)

No. 93-670

Supreme Court, U.S.
FILED
FEB 24 1994
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1993

ALBERT HOWLETT,

Petitioner,

vs.

BIRKDALE SHIPPING CO., S.A.,

Respondent.

On Writ of Certiorari To The
United States Court of Appeals
for the Third Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

1. Does not the shipowner's duty of care owed to a longshoreman under Section 5(b) of the Longshore and Harbor Workers' Compensation Act extend to unsafe conditions existing in a cargo stow of which the shipowner knows or is deemed to know by reason of a duty of inspection, and which are unknown to the longshoreman and his stevedore employer, are not open and obvious, and would not normally be anticipated?

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1. Under the principles set forth in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), a shipowner owes to longshoremen working aboard a vessel a duty of reasonable care under the circumstances. This duty extends to dangerous conditions existing at the start of cargo operations, including dangerous conditions existing in a cargo stow. . . 13

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2. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), on which the decision below is based, that the shipowner's duty of inspection does not extend to the manner in which cargo is stowed aboard a vessel, is contrary to the principles governing vessel liability set forth in this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), and in the Act's legislative history. 18

3. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), that the shipowner's duty of inspection does not extend to the manner in which cargo is stowed aboard a vessel by a loading stevedore, is in conflict with the principle of land-based law which requires that the employer of an independent contractor inspect the work of that contractor. 25

4. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), that the shipowner's duty of duty of care extends only to the ship and its equipment, and not to stowed cargo, is in conflict with the intent of Congress that shipowners should be responsible for dangerous "conditions" aboard vessels. 29

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5. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), that the shipowner's duty of inspection does not extend to the manner in which cargo is stowed aboard a vessel, is in conflict with the intent of Congress that the 1972 Act provide relief for American employer stevedores, not shipowners. 32

6. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), that a shipowner has no duty of care with respect to hazardous conditions in a cargo stow which are "open and obvious" is contrary to this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), and is in conflict with the legislative intent that Section 5(b) of the Act be implemented in a manner which will encourage vessel safety. 37

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No. 93 - 670

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALBERT HOWLETT,
Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,
Respondent.

On Writ of Certiorari To The
United States Court of Appeals
for the Third Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit affirming the decision of the United States District Court for the Eastern District of Pennsylvania

is officially reported at 998 F.2d 1003 (3rd Cir. 1993), and is reproduced in the Joint Appendix at page 52.

The order of the United States Court of Appeals for the Third Circuit denying petitioner's petition for rehearing in banc is not officially reported, and is reproduced in the Joint Appendix at page 54.

The opinion of the United States District Court for the Eastern District of Pennsylvania granting summary judgment against petitioner is not officially reported, and is reproduced in the Joint Appendix at page 42.

The opinion of the United States District Court for the Eastern District of Pennsylvania denying petitioner's motion for reargument is not officially reported, and is reproduced in the Joint Appendix at page 49.

JURISDICTION

The judgment order of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Eastern District of Pennsylvania (J.A. 52) was entered on June 30, 1993. The order of the United States Court of Appeals for the Third Circuit denying petitioner's petition for rehearing in banc (J.A. 54) was entered July 30, 1993. The petition for a writ of certiorari was filed on October 28, 1993. This Court granted a writ of certiorari limited to Question 1 presented by the petition on January 10, 1994. The jurisdiction of this Court is invoked under 28. U.S.C. § 1254(1).

STATUTE INVOLVED

Section 5(b) of the Longshore and Harbor Workers' Compensation Act, as amended in 1972, Pub. L. 92-576, 86 Stat. 1251, and further amended in 1984, Pub. L. 98-426, 98 Stat. 1641, 28 U.S.C. § 905(b).

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

LEGISLATIVE HISTORY INVOLVED

The legislative history accompanying the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act appears in House Report No. 72-1441, and is reprinted in 1972 U.S. Code Cong. & Adm. News, Vol. 3, beginning at page 4698. The portion relating to Section 5(b) of the Act, titled "Elimination of Unseaworthiness Remedy," begins at page 4701 and is reproduced in the Appendix to the petition for a writ of certiorari filed herein beginning at page 18a.

STATEMENT OF THE CASE

Statement of Facts

This case was decided in the courts below on a motion for summary judgment filed by the respondent. Petitioner, in response to this motion, presented deposition testimony establishing the following facts:

Petitioner was injured while working as a longshoreman and engaged in discharging a cargo of bags of cocoa beans from the No. 2 hold of respondent's ship (J.A. 5). Petitioner was injured when he stepped down off the cargo, a distance of approximately three feet, to an area of the deck of the hold from which several bags of cocoa beans had just been removed (J.A. 9-10). When he stepped down into this space, he slipped and fell (J.A. 9, 15), suffering a severe injury which has left him permanently disabled from returning to work as a longshoreman.

The cause of petitioner's slipping and falling was the presence on the deck of a sheet of clear plastic which covered the area of the deck from which the bags had just been removed (J.A. 9, 11, 17-18). The presence of plastic on the deck of the ship under the stow of cocoa beans admittedly was an improper condition (J.A. 33-34). Instead, it is the customary and correct practice to place wood or paper, or a combination of both, on a steel deck under a stow of bags of cocoa beans to prevent damage to the bags as a result of condensation (J.A. 14-15, 20-21, 27-28, 31). Sheets of plastic are not normally used for this purpose, and petitioner and another longshoreman witness testified that they had never seen or heard of plastic being used for this purpose, and that they were not warned or otherwise informed of its use on this particular occasion (J.A. 12, 16, 18, 40). For this reason,

petitioner had no reason to anticipate that, in stepping down onto the deck, he would be stepping onto a slippery surface created by the presence of a sheet of smooth plastic on the deck.

Petitioner testified that the cause of his slipping and falling was the presence of the plastic on the deck and that plastic is more slippery than wood or paper because wood or paper will "grab" and "hold" a metal deck (J.A. 18).

Petitioner also testified that he did not see that plastic was on the deck as he was stepping off the cocoa beans because it was a clear plastic which was dirty and had debris on it (J.A. 12-13), and that he thought he was stepping down onto paper (J.A. 13).[1]

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[1] The bags of cocoa beans were made up into units which were approximately four feet long, four feet wide and three feet high. The procedure followed in discharging the cocoa beans was that four units would be lifted a few feet above the stow using the ship's boom. At that point, they would be held in the air in that position to allow time for the longshoremen working in the hold to go to a place of safety -- in this case behind a container which was in the after end of the hold -- so they would be out of danger if the bags broke or fell while being lifted out over their heads. Once the longshoremen in the hold were safely out of the way, the bags would be lifted from the hold. The reason petitioner was stepping off the stow of cocoa beans at the time he was injured was that he had to cross over the area of the deck from which the bags had just been removed in order to go to the position of safety behind the container (J.A. 10).

The reason petitioner did not see the plastic before the accident was that the units of cocoa beans had been stowed on top of each other in the hold, and the four units which were being removed at the time petitioner was injured were the first units taken out which actually had been resting on the ship's deck (J.A. 9). Before that the deck was obscured by the bags of cocoa beans and was not visible to the longshoremen (J.A. 6-7).

The evidence further established that the plastic had to have been placed under the bags of cocoa beans by the loading stevedore in Guayaquil, Ecuador, where the cocoa beans were loaded aboard the ship. With respect to how the plastic came to be under the bags of cocoa beans, the Captain of the ship testified that the ship *required* that the loading stevedore place some material on the ship's steel deck under a stow of cocoa beans to prevent condensation damage,[2] that this material -- and, indeed, *all* material used in loading the cocoa beans -- was supplied to the loading stevedore by the ship (J.A. 25, 30), and that, normally, wood or paper would be supplied (J.A. 27). However, the ship carried rolls of plastic for use in the loading of cargo (J.A. 25-27), and, in view of this testimony, and the testimony that the ship provided the loading stevedore with all the materials needed in the loading of the cocoa beans (J.A. 25), respondent had no alternative but to admit that it had supplied the loading stevedore with the plastic that was under the cocoa beans at the time petitioner was injured.[3]

There also was evidence of the practice on the ship for the crew to observe cargo loading and unloading operations. In this regard, the ship's Captain testified that the normal practice was to have an officer and three sailors observing

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[2]Initially, the Captain of the ship testified that the decision as to whether any material would be placed under the cocoa beans was made by the loading stevedore (J.A. 31), but, on cross-examination, he admitted that the ship *required* the loading stevedore to put some material under the cocoa beans, and that the loading stevedore had no discretion not to do so (J.A. 34-36).

[3]Respondent admitted to supplying the plastic in briefs filed in the District Court and the Court of Appeals, and repeated this admission in its Brief in Opposition to the Petition for Writ of Certiorari filed herein, at page 2.

cargo operations, both during loading in Guayaquil (J.A. 22), and discharging in Philadelphia (J.A. 25), and that if plastic had been placed under the cocoa beans during loading in Guayaquil, these crew members should have seen it and would have reported it to him or to one of the ship's mates (J.A. 24-25).[4]

The Course of Proceedings

In the district court, respondent's motion for summary judgment was determined on the basis that the law applicable

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[4]The Captain testified:

Q. . . . What is your practice with respect to how many men from the ship's crew are on deck of the vessel watching the loading of cargo when the ship is in Guayaquil?

A. Normally be three sailors and one guard, an officer. (J.A. 22)

* * * * *

Q. And that would start from the beginning -- from the time the longshoremen come on the ship until the longshoremen finish?

A. Yes.

Q. So that if sheets of plastic were being put on the deck for the -- before the cargo -- the cocoa beans were being loaded, they should be able to see that plastic being placed on the deck and stop it?

A. Yes. (J.A. 23)

* * * * *

Q. So that if plastic was placed on the deck under the cocoa beans in Guayaquil in July of 1989, one of the crew members should have seen it?

* * * * *

A. Affirmative. And he would have advised me or one of the ship mates. (J.A. 24)

to the case was governed by the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988). In *Derr*, the Third Circuit had held that a ship had no duty to inspect the manner in which cargo was stowed by a loading stevedore, and could be held liable for a hazardous condition created by improper stowage only if the ship had both "actual knowledge" of the condition and the danger was not "open and obvious," see *Derr*, *supra*, 835 F.2d at 496.

Petitioner, in opposing the motion for summary judgment, argued that the case fell within the *Derr* parameters, contending, first, that the admission that the ship had supplied the plastic to the loading stevedore, coupled with the testimony as to the practice of the ship's crew to observe loading operations, was sufficient to create an issue of fact as to whether the ship had "actual knowledge" of the presence of the plastic under the stow of cocoa beans, and, second, that the presence of the plastic on the deck was not "open and obvious" to petitioner as the deck area where petitioner fell had just been exposed by the removal of cargo, and petitioner reasonably believed that, in stepping down off the cargo, he was stepping down onto paper.

The district court rejected these arguments as a basis for distinguishing *Derr*, holding, first, that the evidence that the ship had supplied the plastic to the loading stevedore did not imply knowledge of how it would be used by the loading stevedore, and, second, that the presence of the crew during the loading operation did not satisfy the *Derr* knowledge requirement because, if the plastic was observable by the crew during the loading operation, then it was an "open and obvious" condition for which a shipowner was not liable (J.A. 45-46). These holdings were affirmed by the Third Circuit by a judgment order without an opinion being filed (J.A. 52).

In the petition for writ of certiorari filed herein, petitioner sought review of two questions. Question No. 1 sought review of the *Derr* holding that a vessel had no duty of inspection to discover dangerous conditions existing in a cargo stow. Question No. 2 sought review of the question of whether evidence of the specific practice of the crew of a ship of observing cargo loading operations gave rise to a duty of care with respect to conditions which such observations might reasonably be expected to disclose. This Court's grant of a writ of certiorari was limited to Question 1 presented by the petition.

In the context of the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, *supra*, and this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), Question No. 1 encompasses two subsidiary questions: First, to what extent does the shipowner's duty of care owed to a longshoreman extend to dangerous conditions existing in a cargo stow? Second, what is the scope of the shipowner's duty of care with respect to a dangerous condition existing in a cargo stow if that dangerous condition is "open and obvious?" This brief, in addressing Question No. 1 presented by the petition, will address both these subsidiary questions.

SUMMARY OF ARGUMENT

1. In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court held that, under Section 5(b) of the Longshore and Harbor Workers' Compensation Act, a shipowner owes to a stevedore and to its longshoremen employees the duty to furnish them with a vessel which is in such condition that they will be able to carry on their cargo operations with reasonable safety. This duty extends to dangerous conditions existing at the start of cargo operations,

and, as to such conditions, the shipowner has a duty of inspection, and is deemed to be "chargeable with knowledge."

2. A dangerous condition existing in a cargo stow as a result of the manner in which that cargo was stowed in a prior loading port, such as caused petitioner's injury in the instant case, is, to an unloading longshoreman, a dangerous condition existing at the start of cargo operations, and, therefore, is a condition for which the vessel is responsible under the principles set forth in *Scindia, supra*. Under these principles, petitioner's evidence established a *prima facie* case of vessel negligence, and it was error to grant summary judgment against him.

3. In *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), the Third Circuit held that a shipowner's duty of inspection did not extend to dangerous conditions existing in a cargo stow. *Derr* was wrongly decided and should be rejected for the following reasons:

(1) In *Derr*, the Third Circuit wrongly interpreted this Court's decision in *Scindia* as relieving vessels from responsibility for conditions created by *any* stevedore, even though that stevedore was not the employer of the injured longshoreman. *Scindia* did not so hold. Rather, the holding of *Scindia* was that a vessel was entitled to rely on a longshoreman's stevedore *employer* to protect the longshoreman from injury from conditions arising within the confines of the stevedoring operations assigned to the *employer*. The basis for this holding was that, as to conditions arising within the confines of the cargo operations assigned to the employer, the employer was subject to a statutory duty under Section 41 of the Longshore and Harbor Workers' Compensation Act to provide its employees with a safe place to work, and, as between the shipowner and an

employer stevedore, with respect to such conditions, the employer, rather than the shipowner, was in the best position to protect a longshoreman from injury. Neither of these factors are present where, as in the instant case, a longshoreman is injured as a result of a dangerous condition created by a loading stevedore. The loading stevedore is not the injured longshoreman's employer and owes him no duty of care under Section 41 of the Act, and the injured longshoreman's employer, not being the stevedore who loaded the cargo, is not in a position prevent the creation of the hazardous condition.

(2) As set forth in Section 5(b)'s legislative history, Congress' principle objective in creating a negligence remedy for longshoremen was to encourage care by vessel operators in providing longshoreman with a safe place to work. Where a dangerous condition is created in a cargo stow as a result of the manner in which the cargo was loaded by a loading stevedore, as between the ship and the unloading stevedore, it is the ship which is in the best position to take steps to prevent the creation of the dangerous condition. The *Derr* holding relieving the ship from responsibility for the manner in which cargo is stowed eliminates the incentive on the shipowner to discover and eliminate dangerous conditions in a cargo stow, contrary to the intention of Congress that the negligence remedy created in Section 5(b) of the Act be applied in a manner which would encourage vessel safety.

(3) In enacting Section 5(b) of the Act, Congress directed that the shipowner's liability for negligence be based on principles similar to that applicable to land-based parties in similar circumstances. Under principles of land-based law, the employer of an independent contractor has a duty to make reasonable (not continuing) inspections of work assigned to an independent contractor to ascertain and correct any hazardous

conditions. This principle should be applied to maritime negligence actions under Section 5(b) of the Act. Requiring such reasonable inspections would impose no additional burden on shipowners, as it already is the custom and practice in the maritime industry for the crew of a vessel to observe both cargo loading and cargo unloading operations.

(4) The *Derr* holding that stowed cargo is not part of the "work space" of a vessel is illogical and unrealistic, and is contrary to the Congressional direction, manifested in Section 5(b)'s legislative history, that the ship's duty of care was to extend to dangerous "conditions" of which the vessel knew or should have known.

(5) Contrary to the Third Circuit's decision in *Derr*, the 1972 Amendments to Section 5(b) of the Act were not intended to grant shipowners relief from the acts of stevedores, but, on the contrary, were intended to provide relief for stevedore employers from indemnity claims by shipowners. The *Derr* holding, which relieves shipowners from responsibility for the manner in which cargo is stowed by a loading stevedore, defeats both the statutory objective of providing relief for stevedores, and the statutory objective of providing a negligence remedy which would promote vessel safety.

(6) The *Derr* holding that a shipowner has no duty of care with respect to dangerous conditions existing in a cargo stow which are "open and obvious" is contrary to this Court's decision in *Scindia, supra,* and to the decisions of every other appellate court which has had occasion to consider the issue. Moreover, the condition which caused petitioner's injury in the instant case was not "open and obvious" to him or to his stevedore employer.

ARGUMENT

1. Under the principles set forth in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), a shipowner owes to longshoremen working aboard a vessel a duty of reasonable care under the circumstances. This duty extends to dangerous conditions existing at the start of cargo operations, including dangerous conditions existing in a cargo stow.

In 1972, Congress, in adopting what became Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), eliminated the longshoreman's right to bring suit against a vessel on the no-fault theories of unseaworthiness and non-delegable duty to provide a safe place to work, and replaced it with the right to bring suit on the fault based theory of negligence.[5] Congress' expressed objective in making vessel operators liable in damages for negligently caused injuries was to encourage care by vessel operators in providing longshoremen with a safe place to work.[6]

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[5]Section 5(b) provides, in pertinent part:

"(b) In the event of injury to a person covered under this chapter caused by the *negligence of a vessel*, then such person . . . may bring an action against such vessel as a third party . . . , and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection *shall not be based upon the warranty of seaworthiness or a breach thereof* at the time the injury occurred." (Emphasis supplied)

[6]The legislative history states:

"Permitting actions against the vessel based on negligence will meet the objective of *encouraging safety* because the vessel will still be required to exercise the same care as a land-based person in providing a *safe place to work*. Thus, nothing in this bill is intended

(continued...)

Congress did not set forth the specific details of the negligence remedy which it had created. Rather, this was to be developed by the courts "through the application of accepted principles of tort law and the ordinary process of litigation," subject only to the mandates that an injured longshoreman "shall be in no less favorable position *vis-a-vis* his rights against the vessel as a third party than is an employee who is injured on land," and that the vessel's liability likewise should be similar to that of land-based parties engaged in non-maritime pursuits.[7]

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[6](...continued)
to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4704, reproduced in the Appendix to the Petition for Writ of Certiorari filed herein at pp. 21a-22a. (Emphasis supplied)

Congress specifically rejected the suggestion that the longshoreman's right to sue for damages be eliminated entirely in favor of a workmen's compensation remedy, stating --

". . . . The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured." Ibid at 4702, Appendix to the Petition for Writ of Certiorari filed herein at p. 18a.

[7]House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4704, reproduced in the Appendix to the Petition for Writ of Certiorari filed herein at p. 22a.

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court, citing *Marine Terminals v. Burnside Shipping Co.*, 294 U.S. 404 (1969), held that the "vessel owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances,'" *Scindia, supra,* 451 U.S. at 166, and that this duty extended, at least, to providing them with a ship which was in such condition that cargo operations could be carried on with reasonable safety to persons and property, and to warning them of hazards which might not be known or anticipated by them, *Scindia, supra,* 451 U.S. 166-167.[8]

The principle issue in Scindia was the relative responsibilities of the vessel and the injured longshoreman's stevedore employer in fulfilling the obligation to provide longshoremen with a safe place in which to work. Noting that a stevedore employer had a statutory duty to provide its employees with a "reasonably safe" place to work under Section 41 of the Act, 33 U.S.C § 941, and the reasonable expectation of the vessel that the stevedore would perform its work without supervision from the vessel, *see Scindia, supra,* 451 U.S. at 170, this Court distinguished between hazardous conditions existing at the start of cargo operations by the longshoreman's stevedore

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[8]This duty was more fully set forth as follows, 451 U.S. at 166-167:

". . . . This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work."

employer, and hazardous conditions which might arise subsequently, during the course of those cargo operations.

It was accepted without dispute in *Scindia* that the vessel's duty of care extended to conditions existing at the *start* of cargo operations, *see Scindia, supra, 451 U.S at 167,* and not only did the *Scindia* opinion recognize that the vessel had a duty of inspection with respect to such conditions, but, as was noted several times, as to conditions existing at the start of cargo operations, the vessel was deemed to be "chargeable with knowledge."[9]

However, once cargo operations began, *Scindia* held that the vessel had no continuing duty of supervision or inspection to discover dangerous condition which might arise within the confines of the cargo operations. This Court concluded, *Scindia, supra, 451 U.S. at 172:*

> ". . . absent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore."

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[9]The phrase "chargeable with knowledge" or similar language appears throughout the *Scindia* opinion, *see Scindia, 451 U.S. at 168, 175, 176, 178.*

Cf. Kirsch v. Plovidba, 971 F.2d 1026, 1029 (3rd Cir. 1992):

> ". . . . But *Scindia* does not cast any doubt on the shipowner's duty to inspect the ship for hazards *before* turning the ship over to the stevedore, because inspection is integral to providing the stevedore with a reasonably safe workplace, a duty the *Scindia* explicitly recognized." (Emphasis in original)

To a longshoreman engaged in unloading cargo from a ship, a dangerous condition caused by the manner in which the cargo being unloaded was stowed in a previous loading port is, for him, a condition existing at the start of cargo operations. Under the decision in *Scindia, supra,* this would be a condition with respect to which the vessel would be deemed "chargeable with knowledge," and would have a duty of reasonable care.

Other than the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), every court which has had occasion to consider this issue has so held, see *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 847-849 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), *Lemon v. Banks Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993), *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), *cf. Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070 (4th Cir. 1982).

Under the foregoing cases, and the principles set forth in *Scindia, supra,* it is clear that the evidence presented by petitioner in the instant case would establish a *prima facie* case of vessel negligence, thereby precluding the granting of summary judgment, and requiring reversal of the judgment below. The sheet of plastic which was on the deck under the cocoa beans admittedly should not have been there (J.A. 33-34); it created a hazardous condition for longshoremen working in the hold because it presented a more slippery walking surface than wood or paper which should have been there (J.A. 18); it was not a condition of which the longshoremen had been warned (J.A. 12, 16, 18, 40), nor was it one which they could be expected to anticipate, as wood or paper

is normally used under a stow of cocoa beans (J.A. 14-15), and petitioner thought that he was stepping down onto paper (J.A.13). Being under the stow of cocoa beans, it necessarily was a condition existing at the start of cargo operations for which the vessel was "chargeable with knowledge," and, finally, it admittedly was a condition which the crew of the ship could have and should have observed at the time the cocoa beans were loaded (J.A. 22-24).

2. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), on which the decision below is based, that the shipowner's duty of inspection does not extend to the manner in which cargo is stowed aboard a vessel, is contrary to the principles governing vessel liability set forth in this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), and in the Act's legislative history.

The decision below granting respondent's motion for summary judgment, was based on the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988). In *Derr*, the Third Circuit had held that the vessel's duty of inspection did not extend to dangerous conditions existing in a cargo stow. To reach this conclusion, the Third Circuit reasoned that when this Court, in *Scindia,* held that the vessel had no duty by way of supervision or inspection to discover dangerous conditions which might arise within the confines of the cargo operations assigned to the stevedore, *Scindia, supra,* 451 U.S. at 172, it meant not only the cargo operations assigned to the injured longshoreman's stevedore employer, but included cargo operations performed by a loading stevedore, even though that loading stevedore was not the employer of the injured long-

shoremen, and the cargo loading operations involved were performed at a different time, in a different port and, more often than not, in a different country, *Derr, supra,* 835 F.2d at 493-495.

As will be set forth herein, the *Derr* decision is in error. Its interpretation of *Scindia* is incorrect, and its holding is in conflict with the Congressional mandate that the negligence remedy created by Section 5(b) of the Act be implemented in a manner which will encourage vessel operators to exercise reasonable care to provide longshoremen with a safe place to work.

This Court's holding, in *Scindia,* that the vessel had no continuing duty to inspect the cargo operations being performed by an injured longshoreman's stevedore employer, was premised on the fact that an "employer" stevedore had a *statutory* duty under Section 41 of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 941, to provide its employees with a reasonably safe place to work, 451 U.S. at 170, and that, *during* cargo operations, it was the employer who was in the best position to take steps to avoid accidents to longshoremen, 451 U.S. at 171. It was on this basis that this Court held that, at least in the first instance, the vessel was entitled to rely on the longshoremen's stevedore employer to protect its own employees from injury, 451 U.S. at 172.

Neither of the forgoing considerations are present when, as in the instant case, a longshoreman is injured as a result of a dangerous condition arising from the unsafe manner in which cargo was stowed in a loading port. The stevedore who loaded the cargo is not the employer of the injured longshoreman and would not owe him a statutory duty of care under Section 41 of the Act, and the injured longshoreman's employer, not being the stevedore who loaded the cargo,

would not be in a position to prevent or correct a dangerous condition arising from the manner in which that cargo was stowed. In these circumstances, not only is there no basis on which the longshoreman's stevedore employer can be considered to be in the best position to prevent the accident, but, instead, by reason of having to pay workmen's compensation benefits to an injured employee, the employer, along with the injured longshoreman, becomes a victim of the dangerous condition created by the loading stevedore, *cf. Marine Terminals v. Burnside Shipping Co.*, 294 U.S. 404 (1969).

Where a dangerous condition resulting from the manner in which cargo is stowed by a loading stevedore is involved, as between the vessel and the unloading "employer" stevedore, it is the vessel, not the unloading stevedore, who is best in position to take steps to ensure the safety of unloading longshoremen. The vessel, in hiring the loading stevedore, and being present when the cargo is being loaded, is in a position to choose a reliable stevedore and to make reasonable observations of its work, and thus be able to discover and remedy any hazardous condition created. The significance of these considerations in achieving the Congressional objective of encouraging vessel safety was aptly set forth in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), as follows, 651 F.2d at 1304:

> ". . . , imposing a duty on the Owner or Time-Charterer or both in this case *should further the congressional goal of safety*. The foreign stevedore, who is presumably primarily at fault, may in many cases be beyond reach of the court's processes, and the injured longshoreman would be unable to sue it. As between the vessel and the stevedore-employer, the vessel is the only one in a position to ensure the safety of the longshoreman. The offloading stevedore has no control whatsoever over the foreign stevedore. *The vessel, on the other hand, can ensure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore.* We do not believe that Congress, in enacting a careful scheme of compensation and liability, could have meant to leave the longshoreman to the mercies of foreign stevedores against which he may have no rights or, at least, no practical remedy." (Emphasis supplied)

Both in Section 5(b) of the Act, and in the Act's legislative history, Congress made a very clear and specific distinction between a vessel's relationship with an "employer" stevedore, and a non-employer stevedore. This distinction appears in two places.

First, while Section 5(b) bars suits by vessels against "employer" stevedores, it does not bar a vessel from suing other stevedores whose negligence may have exposed the vessel to liability for damages, *Turner v. Japan Lines, Ltd., supra*, 651 F.2d at 1304. Section 5(b) limits *only* the liability of an *employer* stevedore. The statute provides:

> ". . . and the *employer* shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." (Emphasis supplied)

Since the Act does not bar the vessel from suing a non-employer loading stevedore, a shipowner found liable to an injured unloading longshoreman for a hazardous condition in a cargo stow may still bring an action against the loading stevedore whose negligence created the condition, and obtain reimbursement for any damages it may be required to pay.

As noted in *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993), the existence of this right to sue the non-employer loading stevedore not only serves as a means by which the vessel can obtain reimbursement of any damages it was required to pay, but serves as an incentive on the loading stevedore to do its work properly. The Court stated, *Riggs, supra*, 8 F.3d at 1446:

> "We noted in *Turner* another factor that is also equally applicable to both types of cargo *defects*. We recognized that section 905(b) does not bar a shipowner from recovering against a foreign stevedore, who is not an "employer" within the meaning of the LHWCA, where the stevedore is primarily at fault for the off-loading longshoreworker's injuries. 651 F.2d at 1303-04. As we recently stated in *Carpenter v. Universal Star Shipping, SA*, where we reaffirmed our holding and reasoning in *Turner*: *'The prospect of vessel-initiated actions against foreign stevedores provides foreign stevedores with an incentive to do their work carefully.'*" 924 F.2d 1539 (9th Cir. 1991). (Emphasis supplied)

Second, in the Act's legislative history, Congress made a very specific distinction between a vessel's responsibility for conditions created by an "employer" stevedore and conditions created by other stevedores. In the legislative history, Congress specified various types of conditions for which a vessel formerly was responsible under the warranty of seaworthiness, and for which, under the 1972 Amendments, the vessel no longer would be liable. All of these were conditions created by stevedores who were, in the words of the legislative history, "subject to this Act," -- *i.e.*, American employer stevedores. The legislative history states:

> "Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores subject to this Act, *Crumedy v. The J.H. Fisser*, 358 U.S. 423, *Albanese v. Matts*, 382 U.S. 283, *Skibinski v. Waterman SS. Corp.*, 330 F.2d 539; for the manner or method in which stevedore or employees of stevedores subject to this Act perform their work, *A.N.G. Stevedores v. Ellerman Lines*, 369 U.S. 355, *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska SS Co. v. Peterson*, 347 U.S. 396, *Italia Stevedoring Co.*, 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established. (Emphasis by underlining supplied)"[10]

The repeated use of the phrase stevedores "subject to this Act" in the legislative history shows that Congress was making a conscious distinction between the vessel's responsibility for conditions arising within the confines of an "employer" stevedore's cargo operations, and conditions created by a non-employer stevedore, a distinction which the decision in *Derr, supra,* fails to recognize.

The decision in *Derr, supra*, is in error because it is based on an equating of the non-employer stevedore's relationship with the vessel with an employer stevedore's relationship

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[10]House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4703-4704, reproduced in the Appendix to the Petition for Writ of Certiorari filed herein at p. 21a

with the vessel, contrary to the clear intention of the Act and its legislative history. Under Section 5(b) of the Act, an employer stevedore, and a loading stevedore, each stand in a *different* legal relationship to the vessel and to an injured longshoreman. The employer stevedore is immune from suit by the vessel, the loading stevedore is not. The employer stevedore is obligated to pay workmen's compensation benefits to an employee longshoreman injured while unloading cargo, the loading stevedore is not. Congress's primary objective in creating a negligence remedy was to encourage safety for longshoreman. For the employer stevedore, the incentive to provide safe working conditions for its longshoremen employees is its statutory duty under Section 41 of the Act, and the exposure to having to pay substantial workmen's compensation benefits if a longshoreman is injured. For the loading stevedore, however, the only incentive is the possible exposure to suit by the vessel, *Riggs v. Scindia Steam Nav. Co.*, *supra*, 8 F.3d at 1446. The Third Circuit's decision in *Derr*, which gives vessel the same right to rely on the loading stevedore which the vessel has to rely on an employer stevedore, operates to destroy both the incentive on the loading stevedore to do its work properly, and the incentive on the vessel to require the loading stevedore to do its work properly. Thus, the decision in *Derr* is wrong, not only because it is wrong in its interpretation of *Scindia*, but because it produces a result which defeats the Act's statutory purpose of encouraging vessel safety. For both these reasons, it should now be rejected.

3. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), that the shipowner's duty of inspection does not extend to the manner in which cargo is stowed aboard a vessel by a loading stevedore, is in conflict with the principle of land-based law which requires that the employer of an independent contractor inspect the work of that contractor.

The legislative history of the Act contains several references to the Congressional expectation that the negligence remedy it was creating would be based on principles of land-based law, and that the shipowner's liability would be comparable to that of land-based parties under similar circumstances. The legislative history states:

> ". . . The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position *vis a vis* his rights against the vessel as a third party than an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner *such as would render a land-based third party in non-maritime pursuits liable under similar circumstances*." (Emphasis supplied)[11]

While a literal application of land-based law to maritime negligence actions is not always practical, *Scindia, supra*, 451 U.S. at 168, f.n. 14, various principles of land-based negligence law can and have been applied to longshoremen's

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[11]House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4704, reproduced in the Appendix to the Petition for Writ of Certiorari filed herein at p. 22a.

negligence actions, *see, e.g., Kirsch v. Plovidba*, 971 F.2d 1026, 1031-1033 (3rd Cir. 1992).

The relationship between a vessel and a stevedore is similar to the land-based relationship between the owner of property and an independent contractor hired to perform work on that property, and under land-based law, the property owner has a duty to make reasonable inspections of the work of the independent contractor. This duty is set forth in § 412 of the Restatement of Torts, Second, as follows:

> § 412. Failure to Inspect Work of Contractor After Completion.
>
> One who is under a duty to exercise reasonable care to maintain land or chattels in such condition as not to involve unreasonable risk of bodily harm to others and who entrusts the work of repair and maintenance to an independent contractor, is subject to liability for bodily harm caused to them by his failure to exercise such care as the circumstances may reasonably require him to exercise to ascertain whether the land or chattel is in a reasonably safe condition after the contractor's work is completed.

While, under land-based law, as reflected in § 412 of the Restatement of Torts, Second, the duty of inspection arises at the completion of the work, it is the practice in the maritime industry for the crew of a vessel to observe cargo operations *during* the cargo loading process to protect both the ship and its cargo, as the record in the instant case illustrates (J.A. 22-

25).[12] The reason for this is obvious, -- waiting until the completion of the cargo loading operation to make an inspection is not feasible. If cargo is broken or damaged during cargo loading operations, or stowed improperly, the crew can not wait until all the cargo is loaded to find this out because, in the course of cargo loading operations, cargo will be covered up with other cargo. For this reason, the presence of crew members on the deck of a ship observing cargo operations while the cargo operations are in progress is more than a custom or practice -- it is an absolute necessity, essential to the ship's business and safety. Therefore, since it is the practice in the maritime industry for the crew of a ship to observe cargo operations while they are in progress, recognition as part of maritime negligence law of the "principle" that a shipowner, who has hired an independent contractor stevedore to perform the work of loading cargo aboard its ship, has a duty to make "reasonable" (not continuous) inspections of that work, would not be imposing any additional burden on the shipowner, but would only be recognizing as true in law that which already is true in fact.

One of the reasons given by the Third Circuit in the *Derr* opinion for its holding that the vessel's duty of care did not extend to the condition of a cargo stow was that holding a vessel responsible for the condition of a cargo stow would require the vessel to make "continuing" inspections of the cargo "at each subsequent port which encountered the condi-

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[12]When the *Derr* case was tried, counsel for Derr offered testimony of the custom and practice in the maritime industry for the crew of a vessel to observe cargo loading operations, *see Derr v. Kawasaki Kisen K.K.*, 835 F.2d at 493-494. While the offer of this testimony was rejected in *Derr* on grounds that it would not alter the vessel's legal duty, *id.* at 835 F.2d 494, the existence of this custom and practice was not denied.

tion of the stow," *see Derr,* 835 F.2d at 494. There are two answers to this argument.

First, the duty under land-based law is not to make continuous inspections, but to make "reasonable" inspections. What is a "reasonable" inspection is a factual issue which will vary from case to case depending on the nature of the cargo, the manner in which it is stowed, and any risks or dangers to be perceived.

Secondly, holding a vessel responsible for inspecting the condition of a cargo stow at each subsequent port at which that cargo stow may be encountered is no different from holding a vessel responsible for inspecting the condition of the ship and its "gear, equipment, tools and work space to be used in the stevedoring operations," *Scindia, supra,* 451 U.S. 167, at each subsequent port where *they* may be encountered. Such inspections are at the heart of the vessel's duty under *Scindia* to provide a vessel which is in such condition that cargo operations may be carried on with reasonable safety, *Ibid.* Since, in point of fact, as the record in the instant case demonstrates, the practice in the maritime industry is for the crew to observe cargo operations in the unloading port as well as in the loading port (J.A. 24-25), expecting the vessel to observe the condition of a cargo stow at each port in which that stow may be encountered would only be recognizing as a legal duty that which, factually, already is being done.

If the Congressional objective to promote vessel safety by imposing liability for negligence on shipowners "such as would render a land-based third party in non-maritime pursuits liable under similar circumstances"[13] is to be achieved,

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[13]House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4704, quoted in text, *supra,* at page .

recognition as part of maritime negligence law of the shipowner's obligation to make "reasonable" inspections of the work performed on the ship by independent contractors, including independent contractor stevedores, under the principle of land-based law set forth in Section 412 of the Restatement of Tort, Second, is essential. For this reason, the Third Circuit's denial of the existence of such a duty in *Derr* should now be rejected.

4. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), that the shipowner's duty of duty of care extends only to the ship and its equipment, and not to stowed cargo, is in conflict with the intent of Congress that shipowners should be responsible for dangerous "conditions" aboard vessels.

In *Scindia,* this Court held that the vessel's duty of care extended to the condition of the "ship's gear, equipment, tools and *work space* to be used in the stevedoring operations," *Scindia, supra,* 451 U.S.at 167 (Emphasis supplied). The Third Circuit, in *Derr*, held that the term "work space," as used in the *Scindia* opinion, was limited to the "physical work space" of the vessel, and that since the foregoing language from the *Scindia* opinion did not specifically mention a condition of the ship's cargo, the shipowner had no duty of care with respect to the condition of a cargo stow, *see Derr, supra,* 490 F.2d at 495.

The distinction made in the *Derr* decision between a cargo stow and a vessel's work space is an example of the proverbial distinction without a difference. In the context of cargo operations, it is impossible to distinguish between a condition of a cargo stow and a condition of a cargo hold (work space)

where that cargo is stowed. Once cargo is stowed in the hold of a ship, it necessarily becomes part of the ship's work space because it becomes the working surface on which the longshoremen must stand to perform their duties. As the facts of the instant case illustrate, a longshoreman necessarily must stand and walk on cargo, and must climb on and off cargo onto the deck of the ship, in the course of performing his duties. If something is placed on that deck, such as a sheet of plastic in the instant case, it becomes part of the work space of the ship even though it is also a part of the cargo stow. The Third Circuit's attempted distinction between cargo and a "physical" work space of the vessel is simply illogical and unrealistic.

There is nothing in the *Scindia* opinion which would exclude the condition of a ship's cargo stow from the vessel's duty of care. Neither *Scindia*, nor *Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404 (1969), from which the "work space" terminology was taken, involved injuries resulting from the unsafe condition of a cargo stow, and the issue of a vessel's responsibility for unsafe conditions in a cargo stow was not considered in either case. In these circumstances, to read into the use of the term "work spaces" an intention to exclude the condition of a cargo stow is rather extreme, or as the Fifth Circuit put it in rejecting a similar argument, a "close reading" of *Scindia*," *see Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 848 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990).

The *Derr* decision's narrow interpretation of the term "work space" to limit the vessel's duty of care is in conflict with the Congressional intent to create a broad negligence remedy as a means of encouraging vessel safety. The legislative history does not make any distinction between a condition of the ship and a condition of the ship's cargo. Rather, the

legislative history speaks only in terms of dangerous "conditions," stating:

> ". . . . Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous *condition*." (Emphasis supplied)[14]

The Third Circuit's distinction between cargo and physical work spaces of a vessel nowhere appears in the Act or its legislative history and severely limits the ability of the Act's negligence remedy to achieve its remedial objective of encouraging vessel safety. As this Court noted in similar circumstances in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), at 271:

> ". . . . Consequently, as we have done before, we must reject a 'theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts . . . a remedial Act . . . .'"

For these same reasons, the distinction in *Derr* between cargo and the physical work spaces of a vessel should also be rejected.

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[14]House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4704, reproduced in the Appendix to the Petition for Writ of Certiorari filed herein at p. 22a.

5. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), that the shipowner's duty of inspection does not extend to the manner in which cargo is stowed aboard a vessel, is in conflict with the intent of Congress that the 1972 Act provide relief for American employer stevedores, not shipowners.

A fundamental error in the Third Circuit's decision in *Derr, supra*, is its misconception of the purpose of the 1972 Amendments to Section 5(b) of the Act.

The *Derr* court viewed the amendments to Section 5(b) of the Act as being primarily intended to grant relief to shipowners from unseaworthiness liability, and as reflecting a Congressional intent to relieve a vessel from responsibility for conditions "'caused by the negligence or other defaults of the stevedore,'" and as "limiting the vessel's potential liability for injuries caused by faulty stowage of cargo to certain narrow circumstances," *see Derr, supra,* 835 F.2d at 493.

This view of the purpose of the 1972 Amendments to Section 5(b) of the Act is fundamentally wrong. The purpose of the 1972 Act was not to provide relief for shipowners -- who needed no relief -- but to provide relief for American stevedores from the consequences of cases such as *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), and *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

To understand what the 1972 Amendments to Section 5(b) were intended to accomplish, it is necessary to go back to the state of the law as it existed prior to 1972. While it is familiar history that, prior to 1972, by virtue of the decision

in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), a longshoreman could sue a vessel on the no-fault theories of unseaworthiness and breach of the non-delegable duty to provide a safe place to work, and that, under *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the vessel could bring an action for indemnity over against the stevedore employer for breach of the warranty of workmanlike service, what is missing from many judicial opinions, and is certainly missing from the *Derr* opinion, is an appreciation of how far the *Ryan Stevedoring* indemnity action had evolved, and the impact this evolution had on vessel liability.

The most striking example of this evolution was in *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964). In *Italia Societa*, a longshoreman was injured as a result of the breaking of a rope which was supplied for use on the vessel by his stevedore employer. In the third-party action brought by the longshoreman against the vessel, the vessel was found to be liable on the grounds of unseaworthiness, but not on negligence, based on the defective condition of the rope, see 376 U.S. at 317. There was no proof that the vessel had knowledge of the defective condition of the rope and none was necessary to establish unseaworthiness liability.[15] The vessel, in turn, brought an action over against the longshoreman's stevedore employer on the theory that it was liable under *Ryan Stevedoring* for providing a defective rope. However, the defect in the rope was "latent" and there was no proof that the stevedore had, itself, been negligent in provid-

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[15] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *cf. Mahnich v. Southern S.S. Co.*, 321 U.S.96 (1944).

ing the rope. Nonetheless, this Court held that the stevedore was liable solely on the basis that it had *supplied* the rope.[16]

The effect of the decision in *Italia Societa, supra*, was that, in most cases, the only liability a vessel would ever have to a longshoreman for either unseaworthiness or negligence would exist only for that fleeting moment of judicial time between the entry of judgment in favor of the longshoreman against the vessel and the entry of judgment in favor of the vessel over against the stevedore. The *Ryan Stevedoring* indemnity action had evolved to the point where it had effectively abolished *Sieracki*, as the longshoreman's unseaworthiness remedy had become the stevedore's, and not the vessel's, liability. The 1972 Amendments did not abolish the shipowner's liability for unseaworthiness, -- that liability already had been effectively abolished by *Italia Societa, supra*. What the 1972 Act did was to reimpose liability on shipowners for negligence in a form in which that liability could not be pushed back on the stevedore.[17]

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[16]This Court stated, *Italia Societa v. Oregon Stevedoring Co.*, 326 U.S. at 324:

"Where the shipowner is liable to the employees of the stevedore company as well as it employees for failing to supply a vessel and equipment free from defects, regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment *supplied* by a stevedore in furtherance of its contractual obligations." (Emphasis supplied)

[17]It is, of course, true that in a pure *Sieracki* case involving a latent defect in ship's equipment, rather than equipment provided by the stevedore, the ship would not have been entitled to indemnity under the decision in *Italia Societa*. However, the frequency of such incidents was not great, and relief for the shipowner from such liability is not mentioned in the legislative history and certainly was not a motivating factor in bringing about the 1972 Act.

It was *Ryan Stevedoring*, not *Sieracki*, which led to the 1972 Amendments to the Act, and, as a review of the Act's legislative history discloses, the 1972 Act was intended as remedial legislation for American stevedores, to be achieved with minimum loss to the rights of longshoremen, and with its major onus falling on shipowners through the Act's imposition on them of liability for negligence in a form in which this liability could not be shifted back to the stevedore, even if, in a given case, that result might seem inequitable, *cf. Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271-273 (1979).

The 1972 Act provided financial relief for stevedore employers in three ways. First, it abolished the shipowner's right to bring a *Ryan Stevedoring* indemnity action against an employer stevedore, thereby capping the employer's potential liability to an injured longshoreman at the amount of the workmen's compensation benefits payable under the Act.

Second, the elimination of the vessel's indemnity action operated to revive as a source of potential revenue for stevedores the ability to make meaningful recoveries of compensation liens where a longshoreman was successful in bringing a third-party action, *see Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 64 (1980), *cf. Edmonds v. Compagnie Generale Transatlantique, supra.*

Third, the elimination of the vessel's indemnity action also served to remove the employer stevedore as an active participant in the longshoreman's third party litigation, with a resulting saving of legal fees. However, this removal of the stevedore as an active participant in the litigation process, also had the consequence of depriving the courts of the presence of the party best in position to be a forceful advocate for interpretations of the Act which would be consistent with its

intended purpose of providing relief for stevedores, thereby leaving to the injured longshoreman the role of a statutory surrogate (by reason of having to repay the compensation lien) for his employer's interests.

Injured longshoremen both gained and lost as a result of the 1972 Amendments. They gained a substantial increase in their workmen's compensation benefits, but lost the right to an almost certain damage recovery in third party actions based on unseaworthiness and breach of the non-delegable duty to provide a safe place in which to work, a result which, in terms of overall financial recovery by injured longshoremen, undoubtedly is a net loss, albeit that this loss is mitigated by the increase in compensation benefits.

Shipowners lost as a result of the 1972 Amendments because they became liable for injuries caused by negligence -- a liability which they theretofore had been escaping under the *Ryan Stevedoring* indemnity cases.

Given this clearly manifested intention that the 1972 Amendments were designed to provide relief for employer stevedores, and not for, but at the expense of, shipowners, coupled with the adoption of a negligence remedy for the purpose of encouraging vessel safety, the view of the Third Circuit, as expressed in the *Derr* decision, that the 1972 Amendments were intended to give relief to shipowners is patently in error, and should be rejected in favor of a judicial approach to interpreting the Act which accomplishes what Congress intended.

When this Court, in *Scindia, supra,* held that the shipowner did not have a duty to supervise the work of a stevedore while that work was in progress, it did so on the basis of the right of a shipowner to rely on the stevedore employer to

avoid exposing its employees to unreasonable hazards, *see Scindia, supra,* 451 U.S. at 170. Under the decision in *Derr*, as the facts of the instant case illustrate, and in stark contrast to the situation which this Court was addressing in *Scindia, supra*, a shipowner will be relieved from liability for a dangerous condition in a cargo stow even though neither the injured longshoreman nor his stevedore employer know of the condition, and even though the injured longshoreman and his stevedore employer are not in a position to avoid or prevent the condition. By holding that the shipowner has no duty of inspection to discover dangerous conditions in a cargo stow, the *Derr* decision shifts the economic burden of a substantial number of negligently caused injuries from the ship back to the injured longshoreman and his stevedore employer, precisely the type of result which the 1972 Amendments were intended to prevent.

Because it is in conflict with the intent and purpose of the 1972 Amendments, the *Derr* decision should be rejected, and the decision below in the instant case, which is based on the *Derr* decision, should be reversed.

6. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), that a shipowner has no duty of care with respect to hazardous conditions in a cargo stow which are "open and obvious" is contrary to this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), and is in conflict with the legislative intent that Section 5(b) of the Act be implemented in a manner which will encourage vessel safety.

In *Derr*, the Third Circuit, in holding that the vessel had no duty of inspection to discover dangerous conditions existing

in a cargo stow, also held that the only responsibility which a vessel had with respect to a cargo stow was to give warning of hazardous conditions of which it was shown to have *actual* knowledge, and that if the hazardous condition was "open and obvious," then the shipowner did not even have the duty to give warning and, in effect, had no duty at all, *see Derr, supra,* 835 F.2d at 496-497. In support of its holding that the ship had no duty beyond the giving of warning, and no duty at all as to "open and obvious" conditions, the *Derr* decision cited this Courts opinion in *Scindia, see Derr, supra, 835 F.2d at 497.*

Derr's citation of *Scindia* for the proposition that a shipowner would not be liable for "open and obvious" conditions clearly was in error, for, in *Scindia*, this Court decided precisely the opposite, rejecting the shipowner's contention that it had no duty with respect to open and obvious conditions, *see Scindia, supra,* 451 U.S. at 167-168.

Since *Scindia* was decided, every Court which has had occasion to consider the issue, other than the *Derr* Court, has rejected the contention that a shipowner is not liable for "open and obvious" conditions, and has specifically cited *Scindia* as the authority for the proposition that the fact that a condition is "open and obvious" is not a defense in suits by longshoremen under Section 5(b) of the Act, *see Moore v. M.P. Howlett,* 704 F.2d 39, 42 (1983), *Harris v. Reederei*, 657 F.2d 53, 54-55 (4th Cir. 1981), *see Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 852, f.n. 13 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), *Martinez v. Korea Shipping Corp., Ltd.*, 903 F.2d 606, 610 (9th Cir. 1990), cited and followed in *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993).

In addition, since the *Derr* case was decided, another panel of the Third Circuit, in a non-cargo stow case, has retreated from the position that a shipowner is not responsible for "open and obvious" conditions, but distinguished *Derr* on its facts, *Kirsch v. Plovidba*, 971 F.2d 1026, 1031 f.n. 7 (3rd Cir. 1992). Consequently, at least for the present, the rule in the Third Circuit is that a shipowner has no responsibility for "open and obvious" conditions in a cargo stow.

In the instant case, the District Court Judge who decided the respondent's motion for summary judgment, took the "open and obvious" defense a step further, and applied it to circumstances in which it clearly had no application. In response to petitioner's efforts to prove that the vessel had "actual knowledge" of the presence of the plastic under the cocoa beans on the basis of the testimony of the ship's Captain that crew members were present during the loading operation and would have seen it (J.A. 22-24), the District Court held that this evidence would only prove that the condition was open and obvious and that, under *Scindia*, a shipowner was not liable for open and obvious conditions (J.A. 46).

Not only was the District Court's citation of *Scindia* clearly in error, but it is a *non sequitur* to suggest that just because a condition was open and obvious to the crew when the cargo was being loaded in Ecuador, that it would be open and obvious to longshoremen weeks or months later when it was being unloaded in Philadelphia. These are two different times and places. The evidence was that the plastic was covered up by the cargo that was placed on top of it (J.A. 11), and was not visible to the longshoremen in Philadelphia until

after the accident to petitioner, and, therefore, not open and obvious to them.[18]

On the record in this case, in view of petitioner's testimony that he did not see the plastic on the deck before the accident, was not warned of it, had no reason to expect it would be there, and thought he was stepping down onto paper (J.A. 11-14), whether the presence of the plastic was an open and obvious condition to the unloading longshoreman in Philadelphia, is, at best, a factual issue, not suitable for determination on a motion for summary judgment. Moreover, at least on the present record, it is not an issue at all, as no witness has testified that the Philadelphia longshoremen knew of the presence of the plastic on the deck of the hold prior to petitioner being injured. Unfortunately, the Third Circuit, by affirming the decision of the District Court by Judgment Order, has allowed what is a patently erroneous holding to stand. We submit that it should now be rejected, as should the *Derr* holding that a vessel has no duty of care with respect to open and obvious conditions in a cargo stow, as it is clearly in conflict not only with this Court's decision in *Scindia*, but with overwhelming authority to the contrary, *e.g.*, *Moore v.*

---

[18]In the court below, the respondent shipowner sought to show that the plastic was visible to the longshoremen by citing the testimony of the stevedore ship boss, Raymond McMullen, and a fellow longshoreman working in the hold, Joseph Fisher, that they saw the plastic. However, the testimony of both these witnesses was that they saw the plastic *after* Howlett was injured, not before. Ship boss McMullen testified that he was standing on the vessel's weather deck, and that after the accident happened, Howlett came up and reported it to him, and at that point, after the bags had been cleared, he was able to look down and see the plastic (J.A. 38). Fellow longshoreman Fisher testified that he did not realize there was plastic on the deck until after he went over and looked down into the area where petitioner fell, at which point he was first able to see the plastic (J.A. 41).

M.P. Howlett, supra, Harris v. Reederei, supra, Woods v. Sammisa Co., Ltd., supra, Martinez v. Korea Shipping Corp., Ltd., supra, Riggs v. Scindia Steam Nav. Co., supra.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Judgment of the Court of Appeals affirming the Judgment of the District Court should be reversed, that the Judgment of the District Court granting summary judgment in favor of respondent should be reversed, and that the case should be remanded to the District Court for trial on the merits.

Respectfully submitted,

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No. 93-670

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALBERT HOWLETT,

Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Does a shipowner have a nondelegable duty under Section 5(b) of the Longshore and Harbor Worker's Compensation Act to ensure the safety of discharging longshoremen from defects in the cargo stow created by the cargo operations of an independent loading stevedore?

2. Does a shipowner have a duty to supervise and inspect the cargo operations of an independent stevedore for the safety of the longshoremen who will board the vessel in a subsequent port?

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COUNTERSTATEMENT OF CASE

Petitioner Albert Howlett is a longshoreman who allegedly slipped and fell while assisting with the discharge of cocoa beans from the M/V PRESIDENTE IBANEZ, a vessel owned by respondent Birkdale Shipping Co., S.A.[1] On the day in question, petitioner, an employee of Northern Shipping Company, was working in the vessel's No. 2 hatch, hooking up drafts of cocoa beans for discharge. (J.A. 5-9, 42). Northern Shipping had been hired as a stevedoring expert by respondent. Prior to his accident, petitioner and the other longshoremen working in the hatch hooked up four or five drafts of cocoa beans which were lifted out of the hold without incident. (J.A. 9). While these initial drafts were being discharged, petitioner and the other longshoremen were working on top of the bags of cocoa beans. (J.A. 7-8).

Immediately prior to petitioner's accident, the longshoremen hooked up the first draft of cocoa beans which was stowed directly on the steel deck. (J.A. 9). When this draft was lifted, it exposed an area of the deck which was approximately eight square feet. (J.A. 17). While the cargo was dangling overhead, petitioner jumped down from the surrounding cocoa beans to the exposed deck, a distance of approximately three feet. (J.A. 10). Petitioner explained that he jumped down into the open space so he could "get [ ] out of the way" while the cargo was lifted. (J.A. 10). When he jumped down, petitioner allegedly slipped and fell because there was a plastic covering on the deck. (J.A. 17-18).

As noted, the exposed area of the deck was approximately eight square feet. (J.A. 17). Petitioner testified that this entire area was covered by plastic. (J.A. 11). Although petitioner denied seeing the plastic before jumping down into the open space, the plastic was visible to his co-workers. Joseph Fisher, a longshoreman who witnessed the accident, testified that he could see the plastic when he looked down at the exposed area.

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1. Birkdale Shipping Co., S.A. is a foreign corporation which is not publicly traded.

(J.A. 40-41). In addition, Raymond McMullen, another longshoreman, testified that he could see the plastic from the top deck of the vessel when he looked down into the hatch. (J.A. 38-39).

The Master of the M/V PRESIDENTE IBANEZ at the time of the alleged accident was Captain Daniel Cafena. Captain Cafena testified that the cocoa beans in the No. 2 hatch were loaded by a foreign, independent stevedore in Guayaquil, Equador. (J.A. 19-20, 31). In addition, Captain Cafena testified that it was the loading stevedore who made the decision regarding the material that was placed under the cocoa beans to protect them from condensation. (J.A. 21, 25, 18). Captain Cafena stated that if he saw plastic being placed under the cocoa beans, he would have registered a complaint with the stevedore since plastic could cause damage to the beans. (J.A. 32, 34). Furthermore, Captain Cafena testified if any member of his crew saw plastic being used for this purpose, they would have reported it to him and he would have asked the loading stevedore to remove the plastic. (J.A. 22, 32, 34-35).

Contrary to the assertion contained in petitioner's Brief, Captain Cafena did not "require" the stevedore to place wood and paper under the cocoa beans; it is simply standard practice for the loading stevedore to place a separation material under cocoa beans to protect the beans from condensation damage. (J.A. 27-28, 34). The decision to place wood, paper, or any other separation material under the cocoa beans was made by the stevedore. Captain Cafena simply testified that if he, or a member of his crew, noticed that the loading stevedore was not placing a separation material under the cocoa beans, or if the stevedore used a material, like plastic, that would cause rather than prevent condensation damage, he would have registered a complaint. (J.A. 22, 32, 34-35).

In his Brief, petitioner correctly points out that it was the usual practice of this ship to have members of the crew present on deck during cargo operations. (J.A. 22). Petitioner's Brief is misleading, however, to the extent it implies that observing cargo operations was the sole, or even primary, activity of these crewmembers. Captain Cafena testified that while these crewmembers were on deck, they were watching the cargo, watching

for stowaways, watching for persons attempting to steal cargo or smuggle drugs, and generally "protecting the ship." (J.A. 21, 23-24, 32). Therefore, contrary to what is implied in petitioner's Brief, these crewmembers were not on deck to supervise or inspect the details of the stevedore's loading operation.

At his deposition, Captain Cafena testified that if plastic had been placed under the cocoa beans during the loading operation in Guayaquil, the crewmembers on deck "should have" seen it and, if they did, they would have reported it to him. (J.A. 23-24, 33).[2] The condition was not reported to the Captain and petitioner failed to offer any evidence to support a finding that any crewmember observed plastic on the deck. Furthermore, there is no indication that plastic was used as a separation material on any deck, or in any hold, other than the immediate deck area where petitioner allegedly fell. (J.A. 39-40).

If there was a piece of plastic on the deck as alleged, respondent has never disputed that the plastic would have come from the vessel's supplies since the vessel made available all of the materials needed for stowing cargo in the various hatches, i.e., paper, plywood, dunnage and plastic. (J.A. 25, 28). There is no evidence, however, that the vessel knew what the loading stevedore intended to do with the plastic. More specifically, there is no evidence that the vessel knew that the loading stevedore placed plastic on the deck under some of the cocoa beans. (J.A. 32). Plastic can be used by a loading stevedore for a myriad of purposes aboard a vessel, including the loading of chemical drums. (J.A. 26, 32).[3]

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2. As respondent pointed out in the district court, Captain Cafena was speaking in terms of visual observations, not in terms of legal duties.

3. Throughout the course of this case, petitioner has alleged that there was no "legitimate" need for plastic during the loading operation in Guayaquil; therefore, the vessel must have known that it was being used as a separation material. This assumption is unwarranted and unsupported. Loading cargo is not an exact science; conditions arise during the course of cargo operations which the expert stevedore must correct or solve. That is the reason why expert stevedores are hired. The loading stevedore in Guayaquil could have obtained a sheet of plastic to separate lots of cargo, or to cover the cocoa beans to protect them from the weather during loading or water entry into the hatch during the voyage.

Petitioner's Brief is also misleading to the extent it implies that the respondent vessel owner knew, or should have known, that placing plastic on the deck would present a improper or unsafe condition for the discharging stevedore. There is no evidence to support this assertion. Captain Cafena did testify, as petitioner asserts, that plastic "should not have been under the cargo." *See* Petitioner's Brief at p. 4. Captain Cafena, however, stated that using plastic as a separation material was improper because, and only because, it could cause damage to the cocoa beans. (J.A. 34). There is no evidence to suggest that Captain Cafena knew, or had any reason to anticipate, that placing plastic on the deck would create a dangerous condition for the longshoremen in the discharge port.[4]

Finally, petitioner asserts that the "dangerous condition" in question, the plastic on the deck, was a condition that a longshoreman "had no reason to anticipate." *See* Petitioner's Brief at p. 5. This is simply not true. When the draft of cocoa beans was lifted out of the hold immediately before the alleged accident, it exposed an area that was approximately eight square feet. (J.A. 17). Two of petitioner's co-workers admitted that they saw the plastic when they looked at the exposed area; in fact, one of these men saw the plastic from the top deck of the vessel. (J.A. 38, 39-41).

SUMMARY OF ARGUMENT

1. In this appeal, petitioner seeks to impose upon shipowners a duty to supervise and inspect the cargo operations of an independent loading stevedore. In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court already determined that, in accordance with the purpose and intent of the 1972 Amendments to the Longshore & Harbor Workers' Compensation Act (33 U.S.C. § 905(b)), vessel owners do not have a duty to supervise the work of an independent stevedore "to discover dangerous conditions that develop or come to light during the loading or unloading" of a vessel. *Scindia*, 451 U.S.

4. Respondent has always disputed petitioner's allegation that plastic on the deck of a vessel presented "an unreasonable risk of harm" for a reasonably competent stevedore.

at 167. The duty proposed by petitioner, therefore, has already been rejected by this Court.

2. The authorities cited by the petitioner do not provide a basis for distinguishing or disregarding the holding in *Scindia* and do not provide any basis for requiring vessel owners to supervise the work of an independent stevedore. In *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), which is the genesis of petitioner's theory of liability, the Ninth Circuit Court of Appeals imposed a duty on shipowners to supervise the work of foreign stevedores, thereby creating a broad and unwarranted exception to section 905(b) which was not authorized or envisioned by Congress when it enacted the 1972 Amendments. The *Turner* holding should be rejected as a case of judicial encroachment upon the role of the legislature.

3. The Legislative History to the 1972 Amendments clearly evidences Congress' intent to eliminate lawsuits against shipowners based upon theories of unseaworthiness or a "non-delegable duty" to provide a safe place to work. Although petitioner describes his theory of liability as a form of "maritime negligence," the duty he seeks to impose is a non-delegable duty to provide a safe place to work. The authorities cited by petitioner do not provide a basis for disregarding Congress' mandate.

4. The duty proposed by the petitioner, if imposed, would result in decreased, not increased, safety for the discharging longshoremen. A review of the reported cases dealing with cargo accidents reveals that the negligence of the discharging "stevedore-employer" is the primary, if not sole, cause of the accident the majority of the time. The discharging stevedore is presumed to be an expert in cargo operations and has a legal duty to identify and remedy cargo hazards before and during the discharge operation. If petitioner's duty were imposed, the stevedore-employer would have no incentive to employ the safest means of discharge since vessel owners would be deemed liable for all cargo accidents and the stevedore-employer would recover its full compensation lien.

5. In *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), the Third Circuit

Court of Appeals properly interpreted the legislative intent underlying the 1972 Amendments and this Court's holding in *Scindia,* and correctly concluded that vessel owners do not have a duty to supervise or inspect the work of an independent, loading stevedore, whether foreign or domestic.

ARGUMENT

I. INTRODUCTION

In *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981), this Court defined the duties that a vessel owner owes to the longshoremen who board the vessel to conduct cargo operations. Before the vessel is turned over to the stevedore, the vessel has a duty of "ordinary care" to have the "ship and its equipment" in reasonably safe condition, and a corollary duty to warn about hidden hazards involving the ship's structure that would not be obvious to or anticipated by a reasonably competent stevedore. Once the vessel has been turned over to the stevedore for cargo operations, however, the vessel can justifiably rely upon the expert stevedore to perform its duties safely and properly. Therefore, in *Scindia,* this Court held that vessel owners do not have a duty to supervise or inspect the cargo operations of an independent stevedore and, generally, may not be held liable for hazards that are created or arise during the loading or unloading operation. *Id.* at 167.

Through this appeal, petitioner seeks to create an extensive and unwarranted exception to this Court's holding in *Scindia.* Specifically, petitioner seeks to impose a duty on the vessel owner to inspect and supervise the loading operation of independent stevedores for the safety of the longshoremen who will board the vessel in a subsequent port. This proposed "duty" is not warranted by the 1972 Amendments to the Longshore & Harbor Workers' Compensation Act, or by the *Scindia* decision. Simply stated, petitioner seeks to impose a non-delegable duty upon vessel owners to provide longshoremen with a safe place to work, a duty which was expressly rejected by Congress in the 1972 Amendments. Furthermore, the duty advanced by petitioner, if accepted, would dismantle the framework of duties

established in *Scindia* and would effectively eviscerate the principles carefully set forth in that opinion.

II. THE ESTABLISHED LAW

In 1972, Congress enacted several important Amendments to the Longshore & Harbor Workers' Compensation Act. 33 U.S.C. §901, et seq. These Amendments represented a carefully constructed compromise which balanced the interests of longshoremen, stevedores and shipowners:[5]

> A tradeoff was made by Congress in an attempt to balance the interests of all parties involved. Under the plan as formulated by Congress, the longshoreman lost his claim against the vessel under the warranty of seaworthiness allowed by *Sieracki,* and in return was granted much higher

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5. On page 36 of his Brief, petitioner asserts that the "1972 Amendments were designed to provide relief for employer-stevedores, and not for, but at the expense of, shipowners. . . ." In addition, petitioner asserts that "[s]hipowners lost as a result of the 1972 Amendments because they became liable for injuries caused by negligence – a liability they therefore had been escaping under the *Ryan Stevedoring* indemnity cases." *See* petitioner's Brief at p. 36. These statements are totally inaccurate. The doctrines of unseaworthiness and "non-delegable duty" supplanted the concept of negligence during their reign. Therefore, while a negligence action was always cognizable, it was simply unnecessary. Thus, it cannot be stated, with any degree of candor, that by eliminating the doctrines of unseaworthiness and "non-delegable duty" Congress intended to increase the liabilities or duties of a vessel owner. As a result of the increased compensation benefits available to longshoremen, which shipowners contribute to in the form of higher stevedoring costs, Congress determined that there was "no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen . . . ." H. Rep. No. 92-1441, 92nd Cong., 2nd Sess., reprinted in U.S. Code Cong. & Admin. News, 4698, 4703 (1972). *See also Munoz v. Flotz Merchante Grancolumbiana, S.A.,* 553 F.2d 837, 839 (2d Cir. 1977) ("Congress, by its extensive overhaul of the LHWCA in 1972, sought to achieve several goals: adequate, increased and sure compensation for injured longshoremen, elimination of the rubric of liability without fault for shipowners, and encouragement of safety within the industry by placing the duty of care on the party best able to prevent accidents."); *see e.g.,* Weiler, *Worker's Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime,* 50 Ohio St. L.J. 825, 841-42, 849-50 (1989).

> compensation benefits. The stevedoring company that employs the longshoreman was forced to pay the higher workmen's compensation benefits, but was relieved of liability from *Ryan*-type indemnity suits brought by the vessel. The vessel lost its indemnity rights against the stevedoring company, but had its liability to longshoremen limited to cases where its negligence can be proved.

Ramirez v. Toko Kaiun K.K., 385 F. Supp. 644, 650 (N.D. Cal. 1974), *modified by Gallardo v. Westfal-Larsen & Co. A/S*, 435 F.2d 644 (N.D. Cal. 1974); *see also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 (1979) ("Congress acted in 1972, among other things, to eliminate the shipowner's liability to the longshoreman for unseaworthiness. . . .").

One of the "most controversial and difficult issues" facing Congress concerned "the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations." H. R. Rep. No. 92-1441, 92d Cong., 2nd Sess., *reprinted in* U.S.C.A.N. 4698, 4701-02 (1978) (hereinafter "H.R. Rep-No. 92-1441"). After careful consideration, Congress enacted section 905(b) of the Amendments which eliminated a longshoreman's right to bring suit against a vessel owner based upon theories of unseaworthiness or a non-delegable duty to provide a safe place to work. The stated "purpose of [these] amendments [was] to place [a longshoreman] injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and *not* to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'non-delegable duty', or the like." *Id.* at 4703. Therefore, while the vessel was to remain liable for "its own negligence," the Committee Reports clearly indicate that Congress did not intend for vessel owners to be held liable "for injuries which are really the fault of the stevedore." *Id.* at 4704.

Although Congress made it clear that shipowners shall only be held liable for their "own negligence," it did not specify the acts or omissions that would constitute negligence. Instead, Congress left this issue to "be resolved through the application

of accepted principles of tort law and the ordinary process of litigation – just as they are in cases involving alleged negligence by land-based third parties." *Id.* After the 1972 Amendments became law, the lower federal courts reached varying conclusions regarding the construction and application of § 905(b). In *Scindia*, therefore, this Court defined the duties of a vessel owner. *Scindia*, 451 U.S. at 175-76. In doing so, this Court drew a sharp distinction between the duties owed by a vessel owner before the vessel is turned over to the stevedore for cargo operations, and the vessel owner's obligations after cargo operations have begun.

Before cargo operations have begun, this Court held that the vessel owes to the stevedore and its longshoremen employees a duty of "ordinary care" to have the "*ship and its equipment*" in a reasonably safe condition, and a corollary duty to warn about hidden hazards involving the ship's structure that would not be obvious to or anticipated by a reasonably competent stevedore:

> This duty extends at least to exercising ordinary care under the circumstances to have the *ship and its equipment* in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, *and to warning* the stevedore of *any hazards* on the ship *or* with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Id. at 166-67 (citations omitted). The duties discussed in this passage have been termed the "turnover duty" and its companion "duty to warn." As noted, they define the shipowner's conduct before cargo operations have begun. The *Scindia* case, however, concerned a vessel owner's duty of care after the vessel has been turned over to the stevedore for cargo operations:

> We are of the view that absent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty. The shipowner, within limits, *is* entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations.

Id. at 168-69, 172 (citations omitted).

In *Scindia,* therefore, this Court held that a vessel owner does not have a duty to supervise or inspect the cargo operations of an independent stevedore and, generally, cannot be held liable for hazards that are created or arise during the course of the cargo operations. This Court did leave open the possibility, however, that a vessel owner may have a "duty to intervene" in the cargo operations of a stevedore under very limited circumstances. Finally, this Court stated that a "vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman. . . ." *Id.* at 167.

As this discussion demonstrates, this Court discussed three duties in *Scindia*: (1) the "turnover duty" and the corollary "duty to warn;" (2) the "duty to intervene;" and (3) the "active participation duty." The present appeal, however, does not involve any of these duties. Instead, petitioner seeks to impose upon vessel owners a duty to "inspect" the work of an independent stevedore, a duty which was specifically rejected in *Scindia*. In an effort to bring this duty within the holding of *Scindia*, petitioner has characterized his theory of liability as a breach of the first *Scindia* duty – the "turnover duty" – since the vessel was turned over to the discharging stevedore with an alleged hidden defect in the cargo stow. The "turnover duty," however,

is not at issue for two reasons: (1) the turnover duty is limited to the "ship and its equipment;" and (2) the turnover duty does not require ongoing inspections after the vessel has been turned over to the stevedore. Petitioner readily admits that the duty he seeks to impose upon vessel owners is a duty to "inspect [] the condition of [the] cargo stow at *each subsequent port* at which that cargo stow may be encountered." *See* Petitioner's Brief at p. 28 (emphasis added).

III. IN *SCINDIA*, THIS COURT ALREADY DECIDED THAT VESSEL OWNERS DO NOT HAVE A DUTY TO SUPERVISE OR INSPECT THE CARGO OPERATIONS OF AN INDEPENDENT STEVEDORE.

The sources of cargo hazards are many and varied due to the nature of the shipping business:

> In almost every instance, when a stevedoring contractor commences the work of loading or unloading a seagoing vessel, the ship has arrived in port only a few hours before. She may have been at sea for weeks or months. Almost always, she has ridden some heavy seas. Often she may have rolled and pitched through mountainous seas for days, taken thousands of tons of water over her decks, sailed through freezing and tropical weather, and been beaten by 100 mile an hour gales. Almost surely she will have been serviced by stevedores of varying degrees of competency in other ports throughout the world.

Hugev v. Dampskisaktieselskabet Int'l, 170 F. Supp. 601, 609 (S.D. Cal. 1959), *aff'd sub nom. Metropolitan Stevedore Co. v. Dampskisaktieselskabet Int'l*, 274 F.2d 875 (9th Cir. 1960), *cert. denied*, 363 U.S. 803 (1960). In the present case, this Court has granted certiorari to determine the duties of a vessel owner pertaining to one particular type of cargo hazard – a hazard that is "hidden"[6] from view by the loading operation of an indepen-

6. The phrase "open and obvious" is a term of art that has developed following this Court's decision in *Scindia* for describing conditions that would be "open and obvious to a reasonably competent stevedore." Therefore, when cargo conditions are discussed, the phrase "open and obvious" connotes a level of expertise in cargo operations which is not possessed by shipowners.

dent stevedore, but would be discoverable by a reasonably competent discharging stevedore.[7] The duty Petitioner seeks to impose regarding this type of condition is set forth on page 27 of his Brief:

> [S]ince it is the practice in the maritime industry for the crew of the ship to observe cargo operations while they are in progress, recognition as part of *maritime negligence* law of the 'principle' that a shipowner, who has hired an independent contractor stevedore to perform the work of loading cargo aboard its ship, has a duty to make 'reasonable' (not continuous) inspections of that work. . . ."

See Petitioner's Brief at p. 27. According to the petitioner, therefore, vessel owners have a duty to conduct "reasonable" inspections of the work performed by independent stevedores (whether they are loading or unloading the vessel) for the safety of the longshoremen in the next port; if a longshoreman is injured in the next port due to a condition in the cargo stow, the vessel owner would be liable under the concept of "maritime negligence."[8]

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7. According to the "Question Presented" by the petitioner in his Brief, this appeal is limited to whether a vessel owner has a duty to inspect the work of an independent stevedore for the safety of the longshoremen in the next port to protect them from a condition in the cargo stow. To support his argument, petitioner states that the condition was "unknown to the longshoreman and his stevedore employer." In his Memorandum opinion, however, the district judge concluded that the condition was "open and obvious." (J.A. 46).

8. In his Petition for Writ of Certiorari, Petitioner set forth two questions for review. The second question was "whether evidence of the specific practice of the crew of a ship of observing cargo loading operations [gives] rises to a duty of care with respect to conditions which such observations might reasonably be expected to disclose." This Court denied the writ of certiorari regarding this question. As in land side law, there is certainly a point where a party hiring an independent contractor will be liable for exercising "control" over the contractor's work. Whether the practice of observing cargo operations is sufficient to impose liability under this theory, however, is not at issue in this appeal. The issue before this Court is simply whether a vessel has a duty, in the first instance, to supervise or inspect the loading operation of an independent stevedore.

A. *Scindia* Revisited

As a result of the 1972 Amendments, longshoremen received a "vast" increase in compensation benefits. *See* H.R. Rep. No. 92-1441 at 4703. The benefits available to longshoremen now greatly exceed the benefits available in other industries.[9] In light of these increased benefits, Congress determined that there is "no compelling reason to continue to require vessels to assume what amounts to an absolute liability for injuries which occur to longshoremen" while working aboard a vessel:

> Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer for all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

Id. at p. 4703.

In *Scindia*, the respondent-longshoreman, like the petitioner in this case, contended that the vessel had a "continuing duty to use reasonable care to discover dangerous conditions" that arise during the course of cargo operations. *Scindia*, 451 U.S. at 168. Based upon the Legislative History cited above, this Court rejected this proposition:

> [W]e cannot agree that the vessel's duty to the longshoreman requires the shipowner to inspect or supervise the stevedoring operation. Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused

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9. The Amendments set compensation rates at 66.7% of a longshoreman's wages up to a maximum of 200% of the national average wage as computed annually; the maximum rate is now $738.30 per week. *See* House Report, U.S. Code Cong. & Admin. News, at p. 4700. Prior to the 1972 Amendments, the maximum compensation was $70.00 per week.

> by the negligence or other defaults of the stevedore. Cases holding the vessel liable on the ground that it owed nondelegable duties to protect the longshoremen from injury were rejected. It would be inconsistent with the Act to hold, nevertheless, that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the *loading or unloading* process. Such an approach would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship. True, the liability would be cast in terms of negligence rather than unseaworthiness, but the result would be much the same.

Id. at 168-69 (footnote and citations omitted).

In the present case, as in *Scindia*, petitioner seeks to impose a duty upon vessel owners to inspect the work of an independent stevedore. Under petitioner's proposed rule, a vessel would not have a duty to inspect cargo operations for the safety of the men working in the hold at the time of loading, but the vessel would be held liable for injuries that occur in a subsequent port as a result of that loading operation.

Such a narrow and provincial reading of *Scindia* is not warranted by any language contained in that decision. This Court did not speak in terms of liabilities, but in terms of duties - vessel owners do *not* have a duty to supervise or inspect the work of independent stevedores. Therefore, although petitioner has presented his proposed duty of inspection under a new rubric, the duty he seeks to impose is exactly the duty which was rejected by this Court in *Scindia*.

B. The Authorities Cited by Petitioner Do Not Provide A Basis for Requiring Vessel Owners to Supervise the Work of An Independent Stevedore

In support of his position, petitioner has cited a number of decisions from the Fifth and Ninth Circuit Courts of Appeals. In the opinions cited, these courts have ignored the Legislative History that accompanied the 1972 Amendments, have relied on factual assumptions which are incorrect, and have failed to

distinguish between the duties owed by vessel owners before and after cargo operations have begun. In addition, a careful review of the cases cited reveals that these courts have *not* adopted the "duty" proposed by the petitioner. In fact, no court has ever imposed the "duty" that he advocates. Furthermore, in support of his theory, petitioner relies upon the Restatement (Second) of Torts § 412. This section of the Restatement also does not impose the duty advanced by petitioner. There is no duty under the Restatement, or under any principle of negligence law, to inspect the work of an independent contractor in the absence of some "non-delegable" duty, a form of strict liability which was expressly rejected by Congress. The "duty" advanced by petitioner, therefore, is not supported by any authority whatsoever.

1. Analysis of the *Turner* Decision

The genesis of petitioner's argument is found in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982). In *Turner*, the Ninth Circuit Court of Appeals held that vessel owners have a duty to protect longshoremen "against concealed dangers [involving cargo] created by a foreign stevedore . . . ." *Id.* at 1304. Although the Ninth Circuit limited its holding to dangerous conditions created by *foreign* stevedores, petitioner has not limited his argument in this manner. Instead, petitioner asserts that vessel owners have a duty to inspect the cargo operations of all stevedores whether foreign or domestic. In support of his position, however, petitioner relies heavily upon *Turner* and the factual assumptions contained in that decision. As discussed below, respondent believes the Ninth Circuit's decision in *Turner* conflicts with the purpose and intent of 1972 Amendments, and this Court's decision in *Scindia;* in addition, *Turner* is an example of judicial encroachment upon the role of the legislature. Furthermore, the policy decisions made by the Ninth Circuit in *Turner* were based upon factual assumptions which are unsupported and, in many cases, are incorrect.

a. *Judicial Encroachment*

As noted above, the Legislative History to the 1972 Amendments reveals that Congress intended to eliminate causes of action against shipowners based upon unseaworthiness, non-delegable duty, or "any other special maritime theory of liability or cause of action." House Report, U.S. Code Cong. & Admin. News, at 4703. Congress stated that vessel owners shall only be liable for their "own negligence," which should be evaluated based upon "accepted principles of tort law." *Id.* at 4704. The duties that a vessel owner owes to longshoremen, therefore, are to be derived from the language of the 1972 Amendments, the expressed intent of Congress, and principles of negligence law. In *Turner*, however, the Ninth Circuit Court did not rely on these sources when the Court imposed a duty on shipowners to supervise the work of foreign stevedores. Instead, the Ninth Circuit created a judicial exception to § 905(b) based upon the law it believed Congress should have enacted.

In *Turner*, the Ninth Circuit concluded that a vessel owner should be held liable for a dangerous condition in the cargo stow created by a foreign, loading stevedore for two reasons: (1) ability to sue; and (2) safety concerns. As to the first reason, the Ninth Circuit noted that "[t]he foreign stevedore, who is presumably primarily at fault, may in many cases be beyond reach of the court's processes, and the injured longshoreman would be unable to sue it." *Id.* at 1304. The shipowner, on the other hand, according to the Ninth Circuit, can sue the foreign stevedore because "[s]ection 905(b) does not bar the shipowner from recovering against the foreign stevedore, only from recovering against the 'employer' as defined in the Act." *Id.* As to its second premise, although the vessel itself was not negligent, the Ninth Circuit felt that it would be appropriate to impose liability on the vessel since it "is the only one in a position to ensure the safety of the longshoremen." *Id.* The Court attempted to justify this judicial legislation in the following statement: "We do not believe that Congress, in enacting a careful scheme of compensation, could have meant to leave the longshoreman to the

mercies of foreign stevedores against which he may have no rights or, at least, no practical remedy." *Id.*[10]

There are several fallacies with the Ninth Circuit's premises. First and foremost, the Ninth Circuit failed to cite any legislative intent to make shipowners liable for the negligence of foreign stevedores. In fact, such a holding is contrary to the plain language used by Congress. The Legislative History clearly indicates that shipowners are not to be held liable based upon any theory of non-delegable duty;[11] they are only to be held liable for their "own negligence."[12] In *Turner*, however, the

10. In the subsequent decision of *Carpenter v. Universal Star Shipping*, 924 F.2d 1539 (9th Cir. 1991), the Ninth Circuit described the duty established in *Turner* as a "failure to intervene." Id. at 1543. As discussed in Section V of this Brief, this characterization of the duty is noteworthy since it reflects the fact that the only duty at issue *during* cargo operations is the duty to intervene.

11. As discussed later in this Brief, there is no common law duty to supervise or inspect the work of an independent stevedore in the absence of a non-delegable duty.

12. The Legislative History is clear regarding Congress' intent to eliminate the concept of a non-delegable duty to provide a safe place to work:

> If we were to agree to just eliminate unseaworthiness, which is liability without fault, and then the longshoremen had the right to bring a negligence action against the shipowner, under the law we may wind up with identically the same situation that we have at the present time, because in the admiralty law there is not only the unseaworthiness but there is the duty, nondelegable duty, on behalf of the shipowner, to provide a safe place to work.
>
> That has been compared to negligence. That is nondelegable, and nondelegable in most cases means it is absolute liability. So if we have negligence, it would be a very easy thing for the court to say, 'well, Congress only eliminated unseaworthiness. Congress knew of the nondelegable duty to provide a safe place to work. So, therefore, the longshoreman has that right.'
>
> That right, which is a negligence concept in admiralty, would give the longshoreman practically the same right he has today. The industry would wind up with the same expenses for third-party cases and the benefits increased and, of course, the insurance costs.

Hearings on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023 before the Select Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 2d Sess, Vol. 2790, at 117 (1972); *see also* Hearings on S.2318, S.525, S.1547 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Vol. 2352, at 270-74, 654-56 (1972).

Ninth Circuit ignored this portion of the Legislative History and made no effort to premise the vessel's liability on negligence principles. Instead, the Court imposed liability on the shipowner based upon its opinion of the law Congress should have enacted. This is a clear case of judicial encroachment upon the role of the legislature.

This Court has repeatedly held that where a statute is the result of a "series of carefully crafted compromises," it is particularly appropriate to maintain "[s]trict adherence to the language and structure of the Act." *Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 748 n.14 (1989). In fact, on several occasions, this Court has reviewed the application of the 1972 Amendments by a lower federal court and held that "the wisest course is to adhere closely to what Congress has written." *Rodriguez v. Compass Shipping Co.,* 451 U.S. 596, 617 (1981); *see also Director, OWCP v. Rasmussen,* 440 U.S. 29, 46-47 (1979); *Washington Metro. Area Transit Auth. v. Johnson,* 467 U.S. 925, 934 (1984); *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 264-65 (1979). ("The reports and debates leading up to the 1972 Amendments contain not a word of this concept. This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely.") Therefore, in the absence of a clear intent to impose a duty as dramatic as the one proposed by petitioner – imposing liability upon vessel owners for the negligence of foreign stevedores – the general rule should apply: "Ordinarily, 'Congress' silence is just that – silence.' " *Reid,* 490 U.S. at 749, *quoting, Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 686 (1987).

The silence of Congress on this particular issue is particularly persuasive. Congress was well aware "that the great bulk of all export and import shipping into and out of the United States is carried on. . . foreign flag vessels" (House Committee Hearings, Volume 2790, p. 296), and that "90 percent of the cargo that comes in or out of the United States, comes in or out on foreign vessels." (Senate Committee Hearings, Volume 2352,

at pp. 352-53). Despite these overwhelming statistics, Congress did not distinguish between the negligence of foreign stevedores and domestic stevedores when it stated that "the vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore." House Report, U.S. Code Cong. & Admin News, p. 4704 (emphasis added). Congress intended and expected that the vessel owner's liability in this scenario would be evaluated in accordance with "accepted principles of tort law" and would not be imposed "under any special maritime theory of liability or cause of action."[13]

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13. On page 23 of his Brief, petitioner quotes one section of the Legislative History to advance the notion that Congress intended to hold vessel owners responsible for the negligence of stevedores other than the "stevedore-employer." Petitioner, however, left out the last line of this paragraph, which states the following:

> This *listing of cases* is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence.

H.R. Rep. No. 92-1441 at 4704.

As this last sentence indicates, this paragraph was simply a listing of cases where recovery under the doctrine of unseaworthiness is no longer permitted. These cases represent the most egregious examples of the "tortured liability triangle" since the vessel was held liable for the negligence of the longshoreman's own employer. Congress, however, did not limit the scope of the Amendments to eliminate only those claims against vessel owners which are based upon vicarious liability for the actions of the "stevedore-employer," which could have been easily accomplished. Instead, Congress clearly and unequivocally eliminated *all* causes of action based upon notions of unseaworthiness or a non-delegable duty to provide a safe place to work. As noted, Congress was well aware that most of the vessels that dock in the U.S. are loaded in foreign ports. If Congress intended to impose liability on shipowners for the negligence of foreign stevedores, it would have done so without resorting to such obtuse language.

Furthermore, as noted, petitioner has not limited his argument to the negligence of foreign stevedores; under his proposed duty, the vessel would be liable for the negligence of stevedores in every prior port, including prior U.S. ports. This section of the Legislative History, however, clearly states that vessels are *not* subject to liability for the acts or omissions of "stevedores subject to this Act," which would include U.S. stevedores in prior ports.

b. *Turner's Factual Assumptions*

As the foregoing discussion demonstrates, in *Turner*, the Ninth Circuit did not rely on the Legislative History of the 1972 Amendments, or principles of negligence law, to impose a duty of supervision on vessel owners. Instead, the Court judicially created an exception to section 905(b), and imposed on vessel owners a non-delegable duty to provide a safe place to work in those cases where cargo is loaded by a foreign stevedore. This alone is a basis for rejecting the *Turner* holding. Beyond this, however, many of the factual assumptions set forth in *Turner* are not accurate.

(i) *Ability to Sue*

In *Turner*, the Ninth Circuit stated that "[t]he foreign stevedore, who is presumably primarily at fault, may in many cases be beyond the reach of the court's processes, and the injured longshoreman would be unable to sue it." *Id.* at 1304. According to the Ninth Circuit, however, since the Amendments to § 905(b) only prevent shipowners from seeking indemnity from the "stevedore-employer," the vessel will be in a position to sue the foreign stevedore for indemnity. While technically this may be a correct interpretation of the Act, and appears to be a convenient and expedient method of channeling liability back to the negligent stevedore, factually, this argument is not grounded upon any reliable authority.

There is simply no authority cited by the Ninth Circuit to support its conclusion that a vessel owner will be in a better position to sue a foreign stevedore than an injured longshoreman.[14] A vessel calling in a foreign port may have no real or continuing contact with the port in question other than being ordered there by a charterer for a single visit. In addition, the Ninth Circuit's position assumes that all foreign countries permit indemnity actions by shipowners for accidents that occur in the United States. Again, there is no authority cited for this

14. In some situations, the injured longshoreman may be able to sue the foreign, loading stevedore directly. *See Muller v. Temura Shipping Co., 629 F. Supp.* 1024 (E.D. Pa. 1986).

proposition. Furthermore, even in countries where such indemnity actions might otherwise be permitted, the offending stevedoring company may be owned and/or operated by the government or a local municipality;[15] the foreign stevedore, therefore, would likely be protected from suit by the doctrine of sovereign immunity. Thus, in light of the lack of any authority supporting the Ninth Circuit's assumptions regarding indemnity actions, the practical effect of *Turner* must be viewed as simply imposing liability without fault upon the shipowner.

(ii) *The Vessel's Ability To Ensure Safety*

The second basis for holding a vessel owner responsible for the negligence of a foreign stevedore, according to the Ninth Circuit, is its belief that a vessel "can ensure" the safety of loading operations in foreign ports. The *Turner* Court stated that the vessel can "ensure" the proper loading of cargo by "choosing a reliable stevedore, supervising its work when necessary, and warning the off loading stevedore of concealed dangerous conditions created by the foreign stevedore." *Id.* at 1304. This belief is premised upon several incorrect assumptions.

As noted above, many foreign stevedores are owned by the state government or a local municipality. For this reason, vessel owners are frequently unable to "choose" their stevedore.[16] In addition, as a matter of practicality, members of the crew are frequently precluded by union regulations and work rules from intruding upon the work areas turned over to the stevedore.[17]

15. Respondent has been informed that stevedores in the following countries are owned and/or operated by a governmental agency: Philippines, Sri Lanka, Thailand, Hong Kong, Korea, El Salvador, Colombia and parts of Greece and Italy.

16. *See Whitfield v. Craigwin Co.*, 727 F. Supp. 183, 185 (E.D. Pa. 1989) (vessels calling at Singapore that do not have their own terminals are required to use the assigned stevedore). As noted in the previous footnote, the same is reportedly true in the following countries: Philippines, Sri Lanka, Thailand, Hong Kong, Korea, El Salvador, Colombia and parts of Greece and Italy.

17. *Munoz v. Flotz Merchante Grancolumbiana, S.A.*, 553 F.2d 837, 840-41 (2d Cir. 1977) ("Indeed, commercial reality and applicable union

Most significantly, members of a vessel's crew are not, and do not purport to be, experts in cargo handling and stowage; this is the job of the expert stevedoring contractor. Also, as discussed in the following section of this Brief, the Ninth Circuit's assumption that "[a]s between the vessel and the stevedore-employer, the vessel is the *only one* in a position to insure the safety of the longshoremen" is, in most cases, factually incorrect. *Id.*[18] In fact, most cargo accidents are caused by the negligence of the "stevedore-employer."

c. *Safety Concerns*

In *Turner*, the parties agreed that the "stevedore-employer could not have prevented [the] accident by any exercise of care." *Id.* Based upon the unique factual circumstances present in the

NOTES *(Continued)*

regulations preclude a rule that would require a non-expert constantly to intrude on the work of a master stevedore in the deepest recesses of the ship.")

18. In a subsequent decision, the Ninth Circuit indicated that, under *Turner*, a vessel owner simply has a duty to warn of hidden dangers. *Taylor v. Moran Agencies*, 739 F.2d 1384 (9th Cir. 1984). Thus, the vessel would not be held liable for open and obvious hazards in the cargo stow. Recently, however, a panel of the Ninth Circuit held that the rule established in *Turner* applied to open and obvious conditions as well. *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993). While this decision may be in accord with the Ninth Circuit's agenda, the *Riggs* panel failed to cite additional legislative history or any principle of negligence law which warrants the imposition of this non-delegable duty for the negligence of a foreign stevedore.

A significant aspect of the *Riggs* decision is the concurring opinion issued by Judge Rymer who recognized that the duty established in *Turner* may not be consistent with the intent of the 1972 Amendments or this Court's decision in *Scindia*:

> By imposing a turn over duty of care to protect stevedores from poor cargo conditions, we are exposing the shipowner to liability equally for lack of reasonable care as to the vessel or the vessel's equipment, and as to the condition of the cargo (at least when stowed by a foreign stevedore). It is unclear that this squares with the restrictive rules of liability of shipowners to stevedores envisioned by the 1972 Amendments to the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), or with the scope of a shipowner's duties recognized in *De Los Santos*. In any case, should *Turner* have led us astray, either the Congress or the Court can set us straight.

Id. at 1449.

Turner case, that may have been an accurate statement since the hazard, according to the description given, was a true "hidden condition" in the cargo stow. It is far from an empirical truth, however, that the discharging stevedore is always free of negligence in cases where it is alleged that the longshoreman was injured by a "hidden condition." In fact, a review of the reported cases dealing with cargo accidents reveals that the existence of a true "hidden" condition is a very rare occurrence; the majority of the time, the negligence of the discharging stevedore-employer is the primary, if not sole, cause of the accident. *See e.g., Hugev*, 170 F. Supp. at 612, and other cases cited below.

As the First Circuit Court of Appeals pointed out:

> A seagoing ship runs the constant risk of encountering severe weather. As a result, it is unlikely that cargo, no matter how carefully stowed, will emerge unscathed and unblemished from the journey. These conditions are known to exist and inhere in the very nature of seaborne commerce. The stevedore is hired for its expertise in handling cargo, including cargo which arrives from its journey in less than optimal condition. If stowage or the cargo itself represents a risk to the longshoremen, the stevedore normally has the right to remedy the defect, at the expense of the ship (as was done here with the partial remastering performed by the stevedore) or to discontinue unloading operations.

Anderson v. Iceland S.S. Co., 585 F.2d 1142, 1151 (1st Cir. 1978);[19] *see also Hugev*, 170 F. Supp. at 609-10. Other courts have likewise recognized that discharging stevedores are hired for their ability to identify and cope with cargo hazards; in fact, the hired stevedore has a duty to identify and remedy such

19. As this quote from *Anderson* indicates, many cargo hazards arise during the voyage as a result of rough seas. If plaintiff's theory of liability is adopted, however, the vessel will be held liable for these hazards as well, even if the "hazard" was not present at the time of loading because, inevitably, it will be alleged that the condition would not have arisen if the cargo was stowed in a different manner. *See Derr*, 835 F.2d 490 (3d Cir. 1987).

hazards. *See Citizen v. M/V Triton,* 384 F. Supp. 198, 201 (E.D. Tex. 1974) ("The *duty* to discover and remedy a dangerous condition caused by the space between the bags of flour as stowed was clearly the responsibility of the stevedore which had control of the work being done in the hold . . . ."); *Hugev,* 170 F. Supp. at 610 ("stevedoring contractors hold themselves out as being trained and equipped to cope with these conditions and these dangers."); *Fedison v. Vessel Wislica,* 382 F. Supp. 4, 6 (E.D. La. 1974); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 366 (1962) ("The petitioner [stevedore] is in the business of handling cargo, and any danger created by the New York bales was at least as apparent to the petitioner as to the respondents. Under its warranty the petitioner had a *duty* to see that the danger was removed before proceeding to unload the Philadelphia cargo.") (emphasis added). The failure of a discharging stevedore to identify a hazard and take appropriate steps to protect the longshoreman is negligence. *Hugev,* 170 F. Supp. at 606; *See Spence v. Mariehamns R/S,* 766 F.2d 1504, 1507 (11th Cir. 1985). Therefore, contrary to what is asserted in petitioner's Brief, and the Ninth Circuit's assumption in *Turner,* most cargo accidents are the result of the discharging stevedore's negligence, i.e., as between the vessel and the stevedore-employer, the vessel is not the only one in a position to ensure the safety of the longshoremen. The instant case is a perfect example.

Petitioner Howlett was injured when he jumped down into a hole in the stow while a draft of cocoa beans was dangling overhead. According to petitioner's description, he slipped on a plastic sheet covering the deck area because he expected to find a covering of wood or paper. Testimony from plaintiff's co-workers established that the plastic was readily visible and, in fact, could be seen from the top deck of the vessel once the dangling cargo was removed. The stevedore-employer, therefore, was negligent by allowing a procedure of discharge whereby longshoremen jumped into open spaces in the cargo stow, with cargo dangling directly above them, without even determining what was at the bottom of the space. Furthermore, as between the vessel (whose crewmembers were not down in the hatch when the cargo was loaded or discharged), and the

stevedore-employer (whose employees were working in the hold prior to the accident and were in a position to identify the hazard if proper discharge procedures were observed), the stevedore-employer was tne "only one in a position to ensure the safety of the longshoremen." *Turner,* 651 F.2d at 1304.

Also, contrary to petitioner's assertion, the duty proposed by the petitioner will not result in increased safety for longshoremen. In fact, the opposite is true.[20] Pursuant to the compensation provisions of the Longshore Act, a longshoreman injured during the course of his work is entitled to receive compensation benefits which greatly exceed the benefits paid in other industries. An injured longshoreman cannot sue his stevedore-employer to recover any additional sum, but he can recover from a shipowner which is found to be negligent. Out of the longshoreman's recovery from the shipowner, however, the stevedore-employer is entitled to recoup its full compensation lien (33 U.S.C. § 933(g)(3)), and the shipowner is statutorily barred from seeking contribution or indemnity from the "stevedore-employer" under any circumstances (33 U.S.C. § 905(a)(b)). Therefore, if the position advanced by the petitioner is adopted, the stevedore-employer will recover its full lien even though its negligence, in most cases, will be a proximate cause of the accident. *See Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256 (1979). Furthermore, there will be no incentive for the discharging stevedore to initiate and enforce safety procedures regarding the discharge of cargo (i.e. the purpose for which the expert stevedore is hired) because the vessel will be held liable for all hazards related to cargo. *See Scindia,* 451 U.S. at 181 (Powell, J. concurring) ("This would

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20. According to the information respondent has been able to obtain, it appears that longshore accident rates have *decreased* in the Third Circuit since the *Derr* decision was issued in 1988, while accident rates have *increased* in the Ninth Circuit over the same period of time. The following are the reported accident rates from the Philadelphia Marine Trade Association for longshoremen in the Port of Philadelphia, per 100,000 hours worked: 1988-74.5; 1989-74.5; 1990-65.8; 1991-72.5; 1992-70; 1993-48.6. For the same period, the West Coast injury/illness rate per 100 full-time longshore workers, as reported by The Pacific Maritime Association, are reported as follows: 1988-11.3; 1989-12.7; 1990-12.5; 1991-13.6; 1992-14.0; 1993-13.0.

decrease significantly the incentives toward safety of the party in the best position to prevent injuries, and undercut the primary responsibility of that party for ensuring safety.")[21]

2. Fifth Circuit Analysis

In his Brief, petitioner asserts that the Fifth Circuit Court of Appeals, like the Ninth Circuit, has held that shipowners are "chargeable with knowledge" regarding dangerous conditions "caused by the manner in which . . . cargo . . . was stowed in a previous loading port." *See* Petitioner's Brief at p. 17. This statement is incorrect.[22] A careful review of the decisions of the Fifth Circuit relating to cargo accidents reveals that it has never charged a shipowner "with knowledge" regarding the existence of a hidden condition in the cargo stow; thus, the Fifth Circuit has never imposed a duty on shipowners to inspect or supervise the work of an independent stevedore. Instead, the Fifth Circuit has imposed liability where the vessel *controlled* the manner of stowage, or the crew had *actual knowledge* of a dangerous condition and failed to warn the discharging stevedore. Dicta in a number of Fifth Circuit cases, however, reveals the confusion that arises when the duties set forth in *Scindia* are not properly distinguished.

In *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), which was issued several months after *Scindia*, the Fifth Circuit

21. In his Brief, petitioner asserts that Section 41 of the Act provides an incentive to the discharging "stevedore-employer" to "provide safe working conditions for its longshoremen employees," but the "only incentive" for the *loading* stevedore is "the possible exposure to suit by the vessel." *See* Petitioner's Brief at p. 24. This is not true. U.S. loading stevedores must comply with Section 41 of the Act and all *loading* stevedores, whether foreign or domestic, by contract, custom and implied warranty have a duty to stow cargo "properly and safely." *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 130 (1956). The 1972 Amendments did not "undermine the justifiable expectation of the vessel that the stevedore would perform with reasonable competence and see to the safety of the cargo operations." *Scindia*, 451 U.S. at 172.

22. If the *Woods* decision stands for the proposition for which it was cited by petitioner (i.e. the vessel is "chargeable with knowledge" of stowage defects), it conflicts with the stated purpose of the 1972 Amendments and this Court's decision in *Scindia*.

Court of Appeals reversed a judgement in favor of the vessel owner because "the jury found that the defendant shipowner was negligent in the method and manner of stowing the cargo . . . ." *Id.* at 116. The evidence supporting the jury's verdict "included the fact that the chief mate had *actual knowledge* of the improper loading technique and failed to take action to either correct the stowage or warn the plaintiff or his co-workers of the dangerous conditions involved in the stow." *Id.* A review of the *Lemon* decision reveals that the Fifth Circuit did *not* impose a duty on the vessel owner to inspect the work of the loading stevedore (the duty at issue in this appeal). Read most broadly, the Court held that where a vessel has *actual knowledge* of a dangerous method of stowage, it may have a duty to intervene in the loading operation to "correct the stowage," or a duty to warn the discharging stevedore about the condition. Both of these potential duties are discussed below; they are separate and distinct, however, from the duty of supervision advanced by the petitioner.

Subsequent to its decision in *Lemon*, the Fifth Circuit addressed the issue of vessel liability for cargo stowage in the case of *Moser v. Texas Trailer Corp.*, 694 F.2d 96 (5th Cir. 1982). In *Moser*, the defendant, Crescent Petroleum, owned a housing module which was being transferred by barge to the Persian Gulf. An independent contractor loaded the module aboard the barge and, in doing so, several grates were removed from the module's second floor walkway. Plaintiff was injured when he fell through an opening created by a missing grate. Plaintiff sued Crescent Petroleum as the owner of the module and the "owner" of the barge:

> [A]pplying "the general law of torts," we held that since Crescent retained no control over the manner of performance of the work by the independent contractors who were loading the module and had no knowledge of the dangerous temporary condition created by them, it owed Mr. Moser no duty — absent a peculiarly unreasonable risk of physical harm — to discover and remedy hazards created by the contractors. We remanded the case, however, "for a

determination of Crescent's status as owner of the vessel and any attendant duties under 905(b)."

On remand the district court assumed rather than finding that Crescent was the shipowner and that the condition in the module was a dangerous condition in the vessel itself. Even so, the court held that Crescent breached no duty it owed Mr. Moser since his injury was caused by a transitory condition of which it had no knowledge, created by independent contractors over whom it retained no control. We affirm that holding for the reasons stated in our former opinion.

The liability as to third persons provided by 33 U.S.C. § 905(b) is one for the negligence. Since *Scindia*, at all events, it is clear that this liability is no more than, if as, extensive as that subsisting under "the general law of torts." Under that law, we held on the former opinion that no duty was owed Mr. Moser by Crescent. It follows that none was owed him under § 905(b).

Id. at 97-98 (footnote and citations omitted).

In *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), which was issued several years later, the plaintiff was injured due to the manner in which "fifty pound sacks of coffee" were stowed by a foreign stevedore. Although the Court determined that the vessel was "negligent in providing an unreasonably dangerous place to work," it did not impose a duty on the shipowner to inspect the work of the independent, loading stevedore:

> The shipowner's liability for damages arising from a dangerous stow is limited to situations where the shipowner knew or should have known of the dangerous condition. There was evidence here that the danger was obvious and that [the shipowner] directly contributed to it by not ordering dunnage. There was also evidence that before Harris was injured Grancolombiano knew that the cargo was improperly stowed and that the longshoremen were continuing to unload the cargo despite the inherent danger.

Id. at 299 (footnote and citations omitted) (emphasis added). As in *Lemon*, the Fifth Circuit in *Harris* used the phrase "should have known," but the imposition of liability was premised on the "actual knowledge" of the shipowner. Furthermore, the Court implied that the vessel may have been liable based upon a breach of the active participation duty ("contributed to it by not ordering dunnage"), or the duty to intervene ("longshoremen were continuing to unload the cargo despite the inherent danger.") The Court never stated, however, that the vessel had a duty to supervise or inspect the loading operation. In fact, the Fifth Circuit noted the following in a footnote:

> If an independent contractor performs the loading operations, and the shipowner reasonably has no knowledge of a dangerous condition thereby created, the owner may escape liability. *Here there was no evidence that Grancolombiana used an independent contractor to load the coffee in South America.*

Id. at 299 n.2 (emphasis added) (citations omitted).

In the case of *Woods v. Sammisa Co.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), the Fifth Circuit again addressed the liability of a vessel owner for a condition in the cargo stow. In *Woods*, the vessel was carrying a cargo of steel pipes, some of which were bound for Houston and some of which were bound for New Orleans. The cargo was loaded so that "some of the Houston pipe overlapped the forward ends of the New Orleans pipe." *Id.* at 845. The vessel was scheduled to dock in Houston first and, if it did, "the stow would have been reasonable." *Id.* at 851 n.10. The vessel's itinerary was changed, however, so the vessel docked in New Orleans first. When the vessel docked, the overlapping condition of the pipe was readily observable. Although the condition of the cargo was not unprecedented, "it was not the most common method" of stowage, and was considered by the longshoreman to be a "bad stow." *Id. at 845.*

The longshoremen were instructed to discharge the pipe "as carefully as necessary, even if that meant discharging the cargo one pipe at a time. " *Id.* A decision was made, however, to discharge the cargo in "three—or four—pipe" bundles. The

accident occurred when one of the bundles "jammed," causing it to swing around and strike the plaintiff. *Id.*

As in prior Firth Circuit decisions, the imposition of liability in *Woods* was premised upon the vessel's actual knowledge of the hazard:

> In *Lemon* . . . the plaintiff sought to hold the owner liable because the chief mate had *actual knowledge* that the stevedore was utilizing improper loading techniques.
>
> Although we noted the language in *Scindia* to the effect that the shipowner has *no duty to supervise cargo operations or inspect the cargo,* we extended *Scindia*'s imposition of a duty on the shipowner to correct, as to all dangerous conditions including those relating to cargo, equipment-related and other defects *of which it has actual knowledge and which it actually knows the stevedore does not intend to correct.*

Id. at 848-49 (emphasis added).

Clearly, the foregoing excerpt from the *Woods* decision suggests that the Fifth Circuit did not impose a duty on the vessel owner to supervise or inspect the work of an independent stevedore to prevent the creation of a hidden hazard in the cargo stow, i.e., the duty proposed by the petitioner. In subsequent dicta, however, the Fifth Circuit made the following statement, purportedly relying upon its prior decisions in *Lemon* and *Harris:* "[I]t is the law in this circuit that, under the first *Scindia* duty, a vessel interest has an obligation to exercise due care to ensure that the vessel's cargo is loaded such that it can be discharged with reasonable safety." *Id.* at 550. Since this later statement seems to support petitioner's argument, a further analysis of the *Woods* decision is warranted.

In *Woods,* the Fifth Circuit did not cite any authority to support the imposition of a duty of inspection other that its prior decisions in *Lemon* and *Harris.* As discussed above, these decisions were not nearly as broad as the *Woods* panel assumed. Furthermore, in *Woods,* the panel recognized that under the Fifth Circuit's prior rulings in *Harris* and *Moser,* the vessel owner would not be liable for a cargo hazard if the loading

operation was performed by an independent contractor. *Id.* at 850 n.9. The Court concluded, however, that the vessel exercised sufficient "control" to impose liability since it hired the loading and unloading stevedores, and it exercised enough "control" over the cargo operations to ensure the safety of the vessel. *Id.* at 848 n.8 and 850 n.9. These statements evidence a lack of understanding regarding the level of "control" needed to impose liability for the acts of an independent contractor,[23] and a lack of appreciation that liability based upon retention of "control" is a form of active negligence, not imputed negligence for the acts of the stevedore as the *Woods* decision implies.

Thus, the Fifth Circuit's decision in *Woods* is inapposite to the issue on appeal since the case did not involve a hidden defect in the cargo, and did not address the question of whether a vessel owner, which does *not* control the loading operation, has a duty of supervision. As noted, although the language in the decision may imply such a duty,[24] this is attributable to an overly

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23. *See Grammer v. Patterson Servs., Inc.,* 860 F.2d 639, 644 (5th Cir. 1988), *cert. denied,* 491 U.S. 906 (1989) ("operational control only arises if the principal exercises direct supervision over the step-by-step process of accomplishing the work."); *see also* Restatement (Second) of Torts § 414, comment C.

24. The following is a synopsis of some of the more perplexing statements contained in the *Woods* decision:

> Thus, according to the defendants, when the [Supreme] Court stated that 'the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore,' [*Scindia*] 451 U.S. at 172, 101 S.C. at 1624, *it meant what it said.* This is so, the defendants contend, because actual control – the basis for the *Scindia* duties – over the cargo and cargo operations belongs, not to the owner/operator, but to the independent stevedore.
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> . . . .
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> Our Court, however, has already visited this question and reached the opposite result.
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> . . . .
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> In so holding in *Lemon,* we assumed that the shipowner has at least the power to control the actions of independent stevedores . . . . Without questioning our assumption that such power exists in theory and practice, we have continued to follow our holding in *Lemon.*

Id. at 848-49, *citing Lemon v. Bank Lines, Ltd.,* 656 F.2d 110 (5th Cir. 1981).

broad reading of the decisions in *Harris* and *Lemon*, the Court's failure to distinguish between the various duties owed by a vessel owner, and a misunderstanding regarding the level of "control" necessary to hold a party liable for the acts of an independent contractor.

It is also noteworthy that the *Woods* panel stated that it was holding the vessel liable for failing to "ensure" that the cargo "was loaded such that it can be discharged with reasonable safety." *Id.* at 850. A review of the facts in *Woods*, however, indicates that the accident occurred due to the negligence of the discharging stevedore, *not* the negligence of the loading stevedore. The cargo in *Woods* was stowed in a "reasonable" manner. Since the vessel proceeded to New Orleans first, however, the discharging stevedore was faced with a cargo condition that was not unprecedented, but was considered by the longshoremen to be a bad stow. At that point, the stevedore, the expert in cargo operations, was retained to unload the cargo in a safe manner. The stevedore, not the vessel, opted to lift three or four pipes at a time, which led to the accident. If the duty advanced by the petitioner is adopted, there would be no incentive for the discharging stevedore to employ the safest method of discharge, because, as in *Woods*, the vessel would be held liable for all cargo accidents and the stevedore would recoup its full compensation lien despite the fact that its negligence caused the accident. Therefore, the *Woods* decision is a good example of the result that will be achieved if the petitioner's duty is adopted – the vessel will be deemed liable for all cargo accidents, even those caused by the negligence of the "stevedore-employer."[25]

NOTES *(Continued)*

These quotes, if anything, evidence the Fifth Circuit's recognition that imposing a duty of inspection conflicts with this Court's holding in *Scindia* and that its assumptions regarding the level of control maintained by vessel owners may not be consistent with actual practice.

25. The case of *Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070 (4th Cir. 1982), likewise does not support the assertion that vessel owners are "chargeable with knowledge" regarding hidden conditions in a cargo stow. The *Gill* case involved an "open and obvious" cargo hazard and the court imposed liability, primarily, based upon a breach of the "duty to intervene." In addition, in *Gill*, the "triable issue was whether paper rolls had been stowed too tightly by the defendant shipowner itself." *Bandeen v. United Carriers*

3. Restatement and Negligence Principles

In enacting the 1972 Amendments, Congress specifically stated that the liability of a vessel owner shall be evaluated in accordance with accepted principles of negligence. In *Turner*, the Ninth Circuit ignored this mandate and imposed its own policy decisions to create a duty to supervise. In this appeal, petitioner, although relying heavily on *Turner*, has recognized this fallacy of the *Turner* case and the need to predicate the vessel's liability on "negligence." Thus, on pages 26-27 of his Brief, petitioner refers to section 412 of the Restatement as a basis for imposing liability and then asserts that this Court should recognize "as part of *maritime negligence* law . . . the 'principle' that a shipowner, who has hired an independent contractor stevedore to perform the work of loading cargo aboard its ship, has a duty to make reasonable (not continuous) inspections of that work." There are several basic problems with this proposition. First, section 412 of the Restatement does not impose the type of duty advanced by petitioner. Second, this proposition is contrary to this Court's holding in *Scindia* that a shipowner does not have a continuing duty to discover and correct dangerous conditions that develop during the loading and unloading process. Third, although plaintiff may cloak his proposed duty of care as a form of "maritime negligence," it is simply an attempt to reimpose a non-delegable duty to provide a safe place to work upon shipowners.

Section 412 of the Restatement, when applicable, requires a party who hires an independent contractor to inspect the area "after the contractor's work is completed." Restatement (Second) of Torts, § 412. In his Petition for Writ of Certiorari, that is the duty petitioner purportedly sought to impose. *See*

(Panama), Inc., 712 F.2d 1336, 1340 (4th Cir. 1983). Simply stated, the Fourth Circuit did not impose a duty upon vessel owners to inspect the work of an independent loading stevedore. *See Bonds v. Mortensen*, 717 F.2d 123, 127 (4th Cir. 1983). Furthermore, even if read in this fashion, the decision provides no basis for disregarding this Court's finding that, in accordance with the 1972 Amendments, shipowners do not have a duty "to take reasonable care to discover dangerous conditions that develop or come to light during the loading or unloading." *Scindia*, 451 U.S. at 167.

Petition at pp. 8-9.[26] As respondent pointed out in its Brief in Opposition, the alleged unsafe condition in this case (i.e. plastic on the deck) could not be observed or discovered if an inspection was conducted after the cargo was loaded. See Response to Petition at p. 11. The same is true of all "hidden" conditions in the cargo stow. Therefore, even if section 412 of the Restatement were applicable to vessel owners, that duty would not support a finding of liability in this case.[27]

Recognizing this defect in his original theory of liability, petitioner now seeks to impose a duty on vessel owners to inspect the work of independent stevedores *during* the course of their cargo operations. Petitioner has failed to cite any section of the Restatement, or any other principle of negligence law, however, which imposes such a duty. Instead, petitioner has asked this Court to create this duty under the rubric of "maritime negligence." Phrasing this duty in terms of "negligence," however, does not fulfill Congress' intent. *See* House and Senate hearings cited in footnote 12. The duty petitioner seeks to impose, no matter how it is termed, is a non-delegable duty to provide a safe place to work upon the shipowner.

As one court succinctly stated when discussing the liability of a party who hires an independent contractor, there is no "common law duty to make inspections and remedy situations created by an independent contractor . . . in the absence of some non-delegable duty." *Kirk v. United States*, 161 F. Supp. 722 (D. Idaho 1958), *aff'd* 270 F.2d 110 (9th Cir. 1959); *see also* Restatement (Second) of Torts, § 409, comment b. Also, as this Court concluded in *Scindia*:

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26. On pages 8-9 of his Petition, petitioner stated that "while, under *Scindia*, a vessel owner may not have a duty to supervise cargo operations while they are in process [sic], . . . the shipowner would have an obligation to inspect the work of a loading stevedore after it is completed to discover any unsafe conditions which might have been created as a result of that work." (emphasis added).

27. As discussed in section V of this Brief, a duty to inspect the condition of cargo at the end of the loading operation and/or before turning the vessel over to a discharging stevedore conflicts with the holding in *Scindia* and is another attempt to reimpose a non-delegable duty upon the vessel owner.

> It would be inconsistent with the Act to hold, nevertheless, that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the *loading or unloading* process. Such an approach would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship. True, the liability would be cast in terms of negligence rather than unseaworthiness, but the result would be much the same. '[C]reation of a shipowner's duty to oversee the stevedore's activity and insure the safety of longshoremen would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b).'

Scindia, 451 U.S. at 169 (emphasis added) (citations omitted).

IV. SEVERAL COURTS, INCLUDING THE THIRD CIRCUIT COURT OF APPEALS IN *DERR V. KAWASAKI KISEN K.K.*, 835 F.2d 490 (3d Cir. 1987), HAVE PROPERLY APPLIED THE LEGISLATIVE INTENT UNDERLYING THE 1972 AMENDMENTS AND THIS COURT'S HOLDING IN *SCINDIA* TO CARGO CASES AND DETERMINED THAT VESSEL OWNERS DO NOT HAVE A DUTY TO SUPERVISE OR INSPECT THE WORK OF AN INDEPENDENT LOADING STEVEDORE, WHETHER FOREIGN OR DOMESTIC.

In his Brief, petitioner asserts that "other than the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), every court which has had occasion to consider the issue" has held that vessel owners are "chargeable with knowledge" regarding the manner in which cargo "was stowed in a previous loading part." *See* Petitioner's Brief at p. 7. Again, this is not an accurate statement. As noted, the Fifth Circuit has never issued an opinion on point. Even in *Turner*, although the Ninth Circuit held that a vessel is "chargeable with knowledge" regarding stowage conditions, the Court limited its holding to stowage performed by foreign stevedores. In addition, contrary to what petitioner has asserted, other courts have considered whether a vessel owner can be held liable for a cargo hazard

created by an independent stevedore and have concluded that it would be inconsistent with the 1972 Amendments to impose the non-delegable duty proposed by the petitioner. In fact, a review of the case law in this area reveals that the decision in *Turner* was an aberration from the application of legislative intent and tort law as the guiding principles for defining a vessel owners' duty of care.

A. Pre-*Turner* Decisions

In *Teofilovich v. d'Amico Mediterranean Pac. Line*, 415 F. Supp. 732 (C.D. Cal. 1976), the plaintiff-longshoreman was injured while discharging crates of marble which were loaded by a foreign stevedore. Plaintiff was injured when one of the crates fell due to the improper placement of several strips of dunnage. "[P]laintiff argued that the vessel owed a non-delegable duty to inspect the work performed by the loading stevedore, an independent contractor employed by [the vessel owner] to load this cargo in a foreign port." Id. at 734. The district court rejected this argument. In doing so, the district court explained why it could not hold a vessel owner liable under the Restatement principles applicable to independent contractors and, at the same time, remain consistent with the legislative intent behind the 1972 Amendments:

> The shipowner no longer is vicariously liable for the negligence of the stevedore company and is prohibited from suing the stevedore for indemnity. 33 U.S.C. § 905(b). However, sections 413 and 416 of the Restatement would hold the shipowner vicariously liable for the negligence of the stevedore. This would do violence to the letter and policy of 33 U.S.C. § 905(b).
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> . . . .
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> Comment (f) to section 413 emphasizes that '. . . the extent of the employer's knowledge and experience in the field of work to be done is to be taken into account . . . .' The courts have long recognized that stevedore companies are expert in loading and discharging vessels but that shipowners are not. . . . It would hardly serve to minimize accidents to require that they be replaced by inexperienced crew members . . . .' This is why the courts created the

> right to indemnity in the first place, and also why Congress gave the shipowner immunity from vicarious liability for the negligence of the stevedore when it took away the shipowner's right to indemnity.
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> . . . .
>
> In its legislative history, Congress '. . . rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel.'
>
> . . . .
>
> Accordingly, the concept of non-delegable duty set forth in section 416 of the Restatement is repugnant to the legislative scheme embodied in the 1972 Amendments and to the uniformity required under the Federal Maritime Law. Indeed, to impose upon a shipowner a non-delegable duty to inspect or correct the work of an independent contractor would reimpose upon the shipowner a type of strict liability which Congress sought to abolish in the 1972 Amendments.
>
> . . . .
>
> Since plaintiff has failed to prove that the vessel officers *knew* of the existence of the misaligned dunnage, or had a duty to inspect for this condition, the court finds that there is no showing of vessel negligence.

Id. at 734-36, 739 (emphasis added) (citations omitted) (*see also* cases cited therein).[28]

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28. In *Teofilovich*, the district court relied on the decision in *Hugev v. Dampskisaktieselskabet Int'l*, 170 F. Supp. 601 (S.D. Cal. 1959), *aff'd sub nom., Metropolitan Stevedore Co. v. Dampskisaktieselskabet Int'l*, 274 F.2d 875 (9th Cir.) *cert. denied*, 363 U.S. 803 (1960), for defining a vessel owner's standard of care. This is of particular relevance since this Court adopted the standard set forth in *Hugev* when it defined the vessel's pre-turnover standard of care. *Scindia*, 451 U.S. at 166-67. Furthermore, in *Hugev*, although the district court recognized that hazards may arise aboard a vessel since it will be turned over to stevedores "of varying degrees of competency," the court limited the shipowner's duties ("implied in fact obligations") to conditions involving the ship and its appliances. *Id.* at 610.

The next decision on point was issued by the Second Circuit Court of Appeals in *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977). In *Ruffino*, the plaintiff-longshoreman was discharging tea and rugs which had been loaded in Calcutta, India, by independent stevedores. The plaintiff was working on top of the cargo when he stepped on a rug "which overhung a space between two pallets of tea." *Id.* at 862. Plaintiff alleged that the "space between [the] pallets should have been covered over with dunnage and that he had no way of knowing it was not, because the rugs which were piled some three feet high hid it from view. At the same time, however, plaintiff sought *to charge defendant shipowner* with knowledge of this hidden condition." *Id.* (emphasis added). The Court of Appeals rejected this argument:

> In enacting the 1972 amendments . . . Congress intended to relieve shipowners of liability predicated upon the negligence of stevedoring companies. *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 507 (2d Cir. 1976). After the amendment, Congress said, the vessel would be liable only for its own failure to use reasonable care, *Munoz v. Flota Merchante Grancolombiana, S. A.*, 553 F.d 837, 840 (2d Cir. 1977), which would be determined in accordance with land-based principles of negligence. *Napoli, supra* at 507.
>
> . . . .
>
> We have here a condition which was allegedly defective but was concededly latent, i.e., located in the in-shore wing of the upper tween deck and hidden from view by layers of carpets. The shipowner was not required to supervise the minute details of the loading stevedores' work. There was no proof that it did so. We cannot say that the district court erred in directing a verdict for the defendant because of plaintiff's failure to establish that the defendant had notice of the claimed defect.

Id. at 862-63 (citations omitted).

In *Teofilovich* and *Ruffino*, both of which were decided before *Turner* and *Scindia*, the courts reviewed the legislative

history behind the 1972 Amendments and principles of negligence law, and determined that vessel owners cannot be held liable for cargo hazards created by a independent stevedore, absent actual knowledge of the condition. *See also, Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644 (N.D. Cal. 1974), *modified by Gallardo v. Westfal-Larsen & Co.*, 435 F. Supp. 484 (N.D. Cal. 1977); *Fedison v. Vessel Wislica*, 382 F. Supp. 4 (E.D. La. 1974); *Citizen v. M/V Triton*, 384 F. Supp. 198 (E.D. Tex. 1974); *cf. Raymond v. I/S Caribia*, 626 F.2d 203, 206 (1st Cir. 1980), *cert. denied*, 451 U.S. 969 (1981) ("In the normal case, it is the condition of the ship, not the cargo, for which the vessel may be held responsible."); *Woods v. Partenreederei M/S Yankee Clipper*, 677 F. Supp. 46, 48 (D. Mass. 1987) ("the shipowner's duty of care does not generally require it to inspect the cargo, since it is entitled to rely on the expertise of the stevedore to ensure that the cargo does not pose any unreasonable risk to the longshoremen"). In *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), the Third Circuit Court of Appeals reached the same conclusion.

B. *Derr*

In *Scindia*, this Court defined the duties of a vessel owner consistent with Congress' intent that the liability of a vessel owner shall be predicated upon principles of negligence and to eliminate notions of seaworthiness and "non-delegable duty." This Court rejected a strict application of the Restatement principles applicable to land side law, but adopted a framework of shipowner conduct that is based on the negligence of the vessel's crew. As this Court pointed out, Congress did not intend vessels "to be liable . . . for the acts or omissions of stevedores, or the employees of stevedores, for the manner in which the stevedore performed its work, or for its gear or equip[illegible]" *Scindia*, 451 U.S. at 165 n.13. Therefore, this Court held that "[i]t would be inconsistent with the Act to hold . . . that [a] shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the *loading* or *unloading* process." *Id.* at 169 (emphasis added). Thus, once the vessel has been turned over to the vessel for cargo operations, "[t]he shipowner, within limits *is* entitled

to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations." *Id.* at 172.

In *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), the Third Circuit Court of Appeals applied the framework set forth in *Scindia* to the issue of shipowner liability for the negligent stowage of cargo by an independent stevedore. The *Derr* Court held, true to the language and intent of *Scindia*, that a vessel owner does not have a duty to supervise the work of longshoremen employed by an independent stevedore; consequently, the vessel cannot be held liable for the negligence of longshoremen working in the hold, whether they are loading or unloading the vessel. In addition, the Third Circuit properly rejected any distinction between foreign and domestic stevedores.

The *Derr* decision involved two cases which were consolidated for appeal. Both cases involved longshoremen who were allegedly injured due to the manner in which cargo was stowed by a foreign stevedore. In both cases, the cargo had shifted during transit and it was alleged by plaintiffs' expert "that the cargo would probably not have moved or shifted had it been properly secured by the foreign longshoremen." *Id.* at 491. In the discharge port, the condition of the shifted cargo was "open and obvious," although the lack of proper shoring or lashing had been a hidden condition in the loading port. In both cases, the district court granted a directed verdict, "holding that under the Supreme Court's decision in *Scindia* . . . the vessel had no duty to inspect or supervise the handling of cargo, and no duty to warn of a dangerous cargo condition which is open and obvious or of which it is unaware." *Id.; see also Robertson v. Tokai Shosen K.K.*, 655 F. Supp. 152 (E.D. Pa. 1987) (district court opinion).

On appeal, the plaintiffs argued that the vessel had a duty to inspect the work of the loading stevedore during the loading operation or in the next port, before turning the vessel over for discharge operations. Relying on this Court's ruling in *Scindia*, the Third Circuit rejected this proposal:

> *Scindia* compels the holding that the shipowner has no duty to supervise or inspect cargo loaded or unloaded by

> stevedores and therefore may not be held liable for injuries arising out the stevedore's failure to perform his job properly.
>
> . . . .
>
> In a similar effort, the appellants urge this court to revive the duty of supervision by adopting an excessively narrow reading of *Scindia*. Appellants would have it that, while there is no duty to supervise the work of a stevedore 'to discover dangerous conditions that develop within the confines of the cargo operations,' . . . the vessel does have a duty to inspect the cargo before cargo operations begin and therefore *'is charged with knowledge of*, conditions which exist at the start of cargo operations.'
>
> . . . .
>
> The district court in *Robertson* thought this reading would "eviscerate" *Scindia* and the Act: 'while the vessel would not be required to supervise and inspect each stevedoring operation . . . it would be held to such a requirement at each subsequent port which encountered the condition of the stow. This makes no sense, and would render the principle of fault-based liability of the vessel a nullity.' We agree.
>
> . . . .
>
> Derr and Robertson suggest that although *Scindia* signifies that the vessel may not be liable for the negligence of the American stevedore employer, the shipowner may be held liable for unsafe conditions created by improper stowage by a foreign loading stevedore. They rely chiefly on the decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 294, 74 L.Ed. 278 (1982).
>
> . . . .
>
> We cannot accept the *Turner* analysis. As *Scindia* makes clear, the 1972 amendments are grounded in the belief that stevedores are primarily responsible for the stowage of cargo. . . . . As this court has pointed out before, 'creation of a shipowner's duty to oversee the stevedore's

> activity and insure the safety of the longshoremen would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b).'
>
> Thus the real issue is not where the cargo was loaded, but whether a vessel may be held negligent for failure to inspect or supervise the stowage of cargo. The scheme carefully drawn by Congress and interpreted in *Scindia* does not change because the cargo stowage was performed by foreign stevedores.

Id. at 493-95 (footnote and citations omitted) (emphasis added).

The holding in *Derr* is a proper application of the policy goals contained in the Legislative History to the 1972 Amendments, and a proper application of this Court's decision in *Scindia*. The Third Circuit properly concluded that imposing the duty proposed by the petitioner would saddle the shipowner with "precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b)." *Id.* at 495.[29]

29. In *Derr*, the Third Circuit properly noted that the pre-turnover duty of care does not apply to cargo conditions. The Court rejected the argument that the term "work space" was intended to include cargo:

> We construe that language to refer to the physical work space. The [Supreme] Court could not have intended by this reference to establish a duty by the ship with respect to cargo that it had expressly negated in other portions of the opinion.

Id. at 495-96. Contrary to what is asserted in petitioner's Brief, this is far from a "distinction without a difference." *See* petitioner's Brief at 29. The term "work space" refers to all aspects of the vessel's structure; items that the vessel controls and has a duty to maintain, repair and inspect. This is not true regarding "cargo," a term that was used throughout the *Scindia* decision, but was noticeably absent from the passage discussing the vessel's pre-turnover duties. Furthermore, as the Third Circuit pointed out, by inserting the term "work space" in this section of the *Scindia* decision, this Court could not have intended to impose a duty of supervision which was "expressly negated" throughout the rest of the opinion.

V. OTHER THEORIES OF LIABILITY INVOLVING CARGO ACCIDENTS

As the foregoing discussion demonstrates, attempts have been made to impose liability upon vessel owners for cargo hazards created by an independent stevedore under various theories of liability since the passage of the 1972 Amendments and the elimination of the doctrine of unseaworthiness. This Court's holding in *Scindia*, which was properly interpreted in *Derr*, forecloses the theory asserted in this appeal, i.e., the vessel owner has a duty to supervise and inspect the loading operations of an independent stevedore. Although beyond the limited scope of the issue presented in this appeal (as phrased by the petitioner and on the facts presented), a review of these other theories of liability reveals that the shipowner's liability for cargo conditions, if any, is limited to situations where the vessel has actual knowledge of a hazard and the condition would not be obvious to or anticipated by a reasonably competent stevedore. *See Scindia*, 451 U.S. at 167.

A. Duty to Inspect Completed Stow

In his Brief, petitioner cites section 412 of the Restatement in support of his theory of liability. As previously discussed, this section of the Restatement, when applicable, imposes a duty to inspect the work of an independent contractor when the contractor's work is completed. In this case, and all "hidden" defect cases, the alleged hazard is not discoverable at this point in time. Furthermore, imposing a *duty* to inspect the work of an independent stevedore at any time would be inconsistent with the purpose of the 1972 Amendments and this Court's ruling in *Scindia*.

The duty set forth in section 412 is limited to a possessor of land who has a non-delegable duty to maintain the land in a safe condition. *See* Restatement (Second) of Torts § 412, comments a and b. *See also Moser v. Texas Trailer Corp.*, 623 F.2d 1006, 1015 n.6 (5th Cir. 1980). Therefore, a duty to inspect the work of an independent stevedore at any time is inconsistent with the 1972 Amendments which eliminated theories of liability premised upon a non-delegable duty to provide a safe place to work.

Furthermore, imposing a duty to inspect after cargo operations are completed is inconsistent with this Court's holding in *Scindia*. This Court clearly stated that a vessel owner is "entitled to rely on the stevedore [to perform its job safely and properly], and owes *no* duty to the longshoremen *to inspect* or supervise the cargo operations." *Scindia*, 451 U.S. at 172 (emphasis added).

The same is true of the theory of liability premised on a duty to inspect cargo before the vessel is turned over for discharge operations. Again, this is simply an attempt to reimpose a non-delegable duty to provide a safe place to work. As discussed previously, the discharging stevedore has a *duty* to identify and remedy hazards before and during discharge operations, and the vessel owner has a justifiable expectation that this duty will be performed properly. In light of its experience and expertise, the discharging stevedore is in a far better position to inspect the cargo and identify potential hazards than the non-expert shipowner. Imposition of a duty to inspect on the shipowner would not serve any purpose in these circumstances other than to open the floodgates of third-party litigation.

B. Duty To Intervene

As noted in footnote 10, in *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539 (9th Cir. 1991), *cert. denied*, 113 S.Ct. 413 (1992), the Ninth Circuit described the duty established in *Turner* as a "failure to intervene." *Id. at* 1543. Although the Ninth Circuit later retracted this description and described it as "confusing," the "failure to intervene" reference is noteworthy. *See Riggs*, 8 F.3d at 1446 n.8. The Ninth Circuit, and the petitioner in this case, have characterized their theories of liability as a breach of the "turnover duty;" however, the only duty at issue *during* cargo operations is the "duty to intervene." The narrow duty to intervene established in *Scindia*, however, does not apply to cargo.[30]

30. Before the duty to intervene arises, the vessel must have actual knowledge of the alleged dangerous condition. *Scindia*, 452 U.S. at 175-76. Therefore, there was no duty to intervene in this case even if this duty applied to cargo conditions.

In *Scindia*, this Court set forth the "duty to intervene" in the following language:

> Yet it is quite possible, it seems to us, that Seattle's judgment in this respect was so obviously improvident that Scindia [the shipowner], if it knew of the defect [in the ship's winch] and that Seattle [the stevedore] was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition.

Scindia, 451 U.S. at 175-76.

In *Derr*, the Third Circuit reviewed the "duty to intervene" established in *Scindia* and concluded that it is "unlikely that the narrow duty of a ship to intervene to make repairs was intended to extend beyond defective conditions with respect to the ship, its equipment, and gear." *Id.* at 496. The Third Circuit concluded that "[s]ince the ship has no duty to inspect the cargo handling operation or the stowed cargo, there would ordinarily be no duty to intervene to remedy dangers created by negligently loaded cargo." *Id.* (citations omitted).[31] Significantly, even the Ninth Circuit has determined that the duty to intervene does not apply to cargo conditions because "the shipowner's equipment and acts did not cause the injury" and because

31. In a footnote in *Derr*, the Third Circuit noted that there was no evidence in that case "to suggest that the cargo presented an exceptional situation. We leave open the issue of a duty by the ship in such circumstances." *Id.* at 496 n.3. Likewise, the respondent in this case does not contest that a situation may arise in a foreign port relating to cargo which is so egregious and so fraught with danger that the shipowner, with actual knowledge of the condition, may have a duty to intervene for the safety of the longshoremen in subsequent ports. Such an exception, however, would have to be drafted with care and be even more stringent than the duty to intervene established in *Scindia*, since a basic premise of the 1972 Amendments and the *Scindia* decision is the shipowner's ability to rely on the stevedore to perform its job properly and safely for all concerned. The stowage of cargo is a matter particularly within the stevedore's expertise and it would be improper to place the vessel in a position of second-guessing the expert's decisions.

"the stevedore, and not the owner, [has] the expertise to prevent or correct" cargo hazards. *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1543-44 and 1544 (9th Cir. 1991).[32] In both of these cases, the courts analyzed the issue in terms of a duty to intervene in the accident port. The same considerations would apply in the loading port, however, since it is the loading stevedore who is the expert in cargo operations. Therefore, in light of the presumed expertise of the stevedore, a duty to intervene in the loading port should not be imposed upon vessel owners to correct potential cargo hazards.

C. Duty to Warn

In *Derr*, the Third Circuit also considered whether a vessel owner has a "duty to warn" about hazards involving the cargo stow. The Court concluded that, "[b]ecause the ship has no duty to inspect cargo stowage operations, the ship can be held liable for failure to warn of improper stowage, *if at all*, when the ship has both actual knowledge and the danger was not open and obvious." *Derr*, 835 F.2d at 496 (emphasis added).[33] In the present case, the district court found that there was insufficient evidence to support a finding that the vessel had actual knowledge of the alleged hazard. (J.A. 45-46). Therefore, a duty to warn did not arise. In addition, the district court found that the condition at issue (plastic on the deck) was not a true "hidden condition" from the perspective of the discharging stevedore; i.e. the condition would have been "open and obvious" to a reasonably competent stevedore. (J.A. 46).

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32. In *Carpenter*, the Ninth Circuit went to great lengths to distinguish *Turner*, but the basic premise in *Carpenter*, that "the stevedore, and not the [vessel] owner, [has] the expertise to prevent *or correct*" cargo hazards, serves to discredit the *Turner* analysis. *Id.* at 1544.

33. The duty to warn established in *Scindia* applies to the physical structure of the ship and the ship's equipment. Therefore, the *Derr* Court was unsure if there is ever a duty to warn about cargo conditions. If such a duty exists, however, the Third Circuit emphasized that actual knowledge of a hazard would be required since the vessel does not have a duty to supervise or inspect the work of independent stevedores.

In his Brief, petitioner asserts that the condition in question was not "open and obvious" because, under his interpretation of this phrase, the individual longshoreman must have actual knowledge of the hazard. To the contrary, this Court stated in *Scindia* that a vessel owner does not have a duty to warn about hazards that would be "obvious or anticipated by [a stevedore] if reasonably competent in the performance of his work." *Scindia*, 451 U.S. at 167. The plastic covering in this case falls squarely within this category. If the stevedore and its longshore employees used reasonable care to identify potential hazards while discharging the cargo as required by law, the plastic would have been readily discoverable. This was a secondary basis for the district court's finding that the vessel did not breach the duty to warn in this case. *See, e.g., Scindia,* 451 U.S. at 167; *see also Hugev*, 170 F. Supp. at 610.

In the last section of his Brief, petitioner criticizes the "*Derr* court" as the only court which relieves vessel owners of liability for open and obvious conditions. *See* Petitioner's Brief at p. 38. Again, this is an incorrect statement. The summary of "open and obvious" cases set forth by petitioner is incomplete and misleading. None of the cases cited imposed a duty on a shipowner to warn about an open and obvious hazard involving the cargo stow.[34] In petitioner's discussion of open and obvious hazards, it is not clear what duty he is seeking to impose upon the vessel owner; it appears, however, that petitioner is arguing that the vessel should have a duty to warn discharging stevedores about cargo conditions which are open and obvious. This argument is not supportable logically or legally.

As the Third Circuit pointed out in *Derr*, when a cargo hazard is open and obvious there is "no warning that the ship [can give that would add] to the knowledge of a competent stevedore." *Id.* at 496. Furthermore, the basic premise underlying the *Scindia* decision is the fact that stevedores are hired for their expertise in cargo operations, which includes their ability

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34. In *Riggs*, the vessel owner was held liable for an open and obvious hazard involving the cargo stow, but liability was premised upon the duty of inspection established in *Turner*, and not a duty to warn. *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993).

and duty to identify and deal with cargo hazards. Therefore, the *Derr* Court properly held that there is no duty to warn about open and obvious cargo hazards.[35]

Furthermore, the "duty to warn" is not applicable to hazards in the cargo for another important reason. The stevedore is presumed to be an expert in cargo operations and is hired to load and unload cargo. Under established principles of maritime law, an independent contractor who performs work aboard a shipping vessel may not recover if he is injured by the very condition he was hired to repair. *West v. United States*, 361 U.S. 118 (1959); *Hill v. Texaco*, 674 F.2d 447 (5th Cir. 1982); *Peters v. Titan Nav. Co.*, 857 F.2d 1342 (9th Cir. 1988); *Alphin v. Marquesa Maritime*, 747 F. Supp. 1223 (E.D. Tex. 1990). Therefore, if the vessel owner's liability for longshore accidents is premised on principles of negligence law as Congress intended, and not a special theory of liability, a vessel owner should not be held liable where an accident occurs as a result of an open and obvious hazard involving the cargo stow.[36]

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35. The cases cited by petitioner, other than *Riggs*, involved open and obvious hazards relating to the ship's walkways and equipment. Under those circumstances, the Third Circuit, and the other courts cited have held that a vessel may be liable for an open and obvious hazard, *if* there is evidence from which the vessel should anticipate that the stevedore will not or cannot avoid the hazard (petitioner left out this portion of the duty). In that situation, the vessel may have a duty to eliminate the hazard. *See e.g., Kirsch v. Plovidbva*, 971 F.2d 1026 (3d Cir. 1992). This exception simply does not apply when the hazard involves cargo because, unlike the "ship and its equipment," the vessel does not have a duty to maintain, repair or inspect cargo.

36. The *Amicus* Brief filed by the National Association of Waterfront Employers raises the novel, but totally indefensible argument that the duties imposed on a shipowner under the Carriage of Goods by Sea Act (COSGA), 46 U.S.C. §1300, et seq., provide a basis for imposing "non-delegable liability" on shipowners for accidents to longshoremen caused by the manner in which cargo was stowed by an independent stevedore. COSGA is a contractual-based statute enacted in 1936 which distributes liability for cargo damage between the shipowner and the shipper of the cargo; the statute has no bearing on the duties owed by a vessel owner to longshoremen who board the vessel and conduct cargo operations. *See Turner v. Japan Lines*, 651 F.2d 1300, 1305 (9th Cir. 1981) (the contract between the vessel owner and the charterer "was not relevant to the duty owed by either defendant to the plaintiff [longshoreman.]").

CONCLUSION

In this appeal, petitioner seeks to impose liability on a shipowner for the improper stowage of cargo by employees of an independent stevedoring contractor. Imposition of such a duty would be contrary to the specific intent and purpose of Congress in enacting the 1972 Amendments, as well as this Court's prior holding in *Scindia*, for the reasons discussed in respondent's Brief.

In addition, a primary goal of Congress in enacting the 1972 Amendments was to create a workers' compensation system that was fair and just to injured longshoremen, and that would reduce the amount of expensive and unnecessary third party litigation arising from longshore accidents that was clogging the federal courts. Accordingly, the maximum compensation for injured longshoremen was increased from $70.00 per week to its current maximum rate of $738.30 per week, greatly exceeding the benefits available in other industries. Shipowners essentially underwrite the cost of the increased compensation benefits for

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NOTES *(Continued)*

The *Amicus* Brief readily admits that it seeks to impose upon shipownersa "non-delegable duty . . . to ensure that the cargo is carefully loaded and stowed in the vessel." *See Amicus* Brief at p. 11. *Amicus* fails to cite any authority either prior to, or subsequent, the 1972 Amendments in which the COGSA duty has been used as the basis for determining a shipowner's liability to an injured longshoreman; *Amicus* also fails to cite any basis for disregarding the mandate issued by Congress in 1972, eliminating claims against shipowners based upon a "non-delegable duty." Thus, even if COSGA had been the applicable standard of care prior to the 1972 Amendments, which it was not, the 1972 Amendments specifically eliminated any such a "non-delegable duty."

The *Amicus* Brief also fails to point out that even though the shipowner has a non-delegable duty of "due care" for the condition of cargo under COSGA, the shipowner is entitled to bring a claim for indemnity against a stevedore or other third party whose negligence in handling the cargo has imposed liability on the shipowner under COSGA. *See Francosteel Corp. v. SS Tien Chung*, 375 F.Supp 794 (S.D.N.Y. 1973). This in essence would be a return to the tri-party *Ryan Stevedoring* litigation which the 1972 Amendments were specifically designed to eliminate. The *Amicus* Brief also fails to mention other *"quid pro quo"* defenses available to the shipowner under COSGA in return for its "non delegable" duty relating to the condition of the cargo, including the $500.00 package limitation. 46 U.S.C. § 1304(5).

the stevedores' employees through higher stevedoring charges. In return, Congress eliminated the third party liability of shipowners for accidents to longshoremen not caused by the shipowner's own negligence, which significantly reduced the number of third party lawsuits. Reimposing liability on shipowners for the negligence of an independent contractor would not only improperly subject shipowners to costly third party claims, but it would also inundate the federal courts with personal injury lawsuits which Congress intended to fall within the workers' compensation provisions of the Longshore Act.

Finally, from a practical standpoint, there is absolutely no evidence to support the Ninth Circuit's belief that reimposition of a non-delegable duty on the shipowner for the negligence of the loading stevedore will increase safety for the discharging longshoremen. In fact, as noted in Section III(A)(1)(c) of this Brief, the contrary appears to be true, as was predicted in Justice Powell's concurring Opinion in *Scindia*.

For the foregoing reasons, respondent respectfully requests that the Judgment of the Third Circuit Court of Appeals and the Judgment of the District Court granting Summary Judgment in favor of respondent be affirmed.

Respectfuly submitted,

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In The
Supreme Court of the United States
October Term, 1993

ALBERT HOWLETT,

Petitioner,

vs.

BIRKDALE SHIPPING CO., S.A.,

Respondent.

On Writ of Certiorari To The
United States Court of Appeals
for the Third Circuit

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No. 93 - 670

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALBERT HOWLETT,
Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,
Respondent.

REPLY BRIEF FOR PETITIONER

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1. Holding a shipowner responsible for dangerous conditions in a cargo stow of which the shipowner knows, or would have reason to know by a reasonable inspection, would neither be the imposing of liability on a theory of "non-delegable duty," nor would it require the shipowner to "supervise" the work of the loading stevedore.

When Congress amended Section 5(b) of the Longshore and Harbor Workers' Compensation Act to eliminate the longshoreman's right to sue on the theory of unseaworthiness, it also stated that vessel liability no longer was to be

predicated on theories of "non-delegable duty."[1] Taking this as its cue, respondent repeatedly asserts in its brief that the "duty petitioner seeks to impose. . . is a non-delegable duty to provide a safe place to work . . ." (Respondent's Brief, page 34). This assertion is patently incorrect. In no way is the duty which petitioner is urging a form of "non-delegable duty." Rather, it is a duty of care which holds a shipowner liable, not for the negligence of others, but for the shipowner's *own* negligence in failing to remedy a dangerous condition of which the shipowner knows or, in the exercise of reasonable care, should have discovered. Not only is this not a form of "non-delegable duty," it is exactly the same duty of care which this Court previously adopted in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

In *Scindia* this Court held that the shipowner had a duty to exercise "ordinary care under the circumstances to have the ship and its equipment is such condition" that the stevedore would be able to conduct its cargo operations "with reasonable safety," see *Scindia*, 451 U.S. at 166-167. Therefore, as to conditions existing at the start of cargo operations, the vessel had a duty of "reasonable" inspection, and was "chargeable with knowledge" of those conditions which a "reasonable" inspection would be expected to disclose, *see Scindia*, 451 U.S. at 178.

When this Court, in *Scindia*, held that the vessel was "chargeable with knowledge" of dangerous conditions existing at the start of cargo operations, it clearly was speaking in the context of negligence law, *i.e.*, -- the shipowner had a duty to use "reasonable care" to discover dangerous conditions

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[1]House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4703, reproduced in the Appendix to the Petition for Writ of Certiorari filed herein at p. 21a.

existing at the start of cargo operations, and is "chargeable with knowledge" of those conditions which a "reasonable" inspection would have disclosed. Therefore, although not specifically mentioned in the *Scindia* opinion, a shipowner would not be "chargeable with knowledge" of conditions which were either latent or would not have been disclosed by a reasonable inspection, as holding a shipowner liable for such conditions would be tantamount to holding a shipowner liable for unseaworthiness.

Similarly, in the instant case petitioner does not contend that a shipowner should be held liable for dangerous conditions in a cargo stow which are either latent or would not have been disclosed by a reasonable inspection, and to the extent that respondent, in its brief, suggests that the duty which petitioner is urging is something more than the *Scindia* duty of "reasonable" inspection, respondent is misstating petitioner's position.[2]

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[2]Two of the decisions on which respondent places its greatest reliance, the pre-*Scindia* decisions in *Teofilovich v. d'Amico Mediterranean/Pacific Line*, 415 F. Supp. 732 (C.D. Cal. 1976), and *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2nd Cir. 1977), are examples of factual situations in which, at least on the basis of the evidence set forth in the opinions, the alleged dangerous condition in the cargo stow was such that it was not capable of being discovered by a "reasonable" inspection. In *Ruffino*, the condition was "concededly latent," *see* 559 F.2d at 863, and in *Teofilovich*, counsel for the longshoreman made no effort to establish that the alleged dangerous condition was capable of being discovered by a reasonable inspection. On their facts, therefore, neither *Ruffino* nor *Teofilovich* are in conflict with the principle that a shipowner has a duty to make "reasonable," but not "continuous," inspections of cargo loading operations, and the statements in the *Ruffino* and *Teofilovich* decisions that the shipowner does not have a duty to inspect or supervise the "minute details" of a cargo stow are but an alternative way of expressing this principle. Contrary to the decision in *Derr v. Kawasaki Kisen K.K.*, 835

(continued...)

Under *Scindia*, the vessel's liability is predicated, not on who may have created a dangerous condition, or on how or when that dangerous condition may have come into existence, but, rather, on the shipowner's "knowledge" that a dangerous condition exists. Where a longshoreman suffers injury by reason of a dangerous condition of which the shipowner knows, or in the exercise of reasonable care should have discovered, the vessel is held liable, not because it is responsible for the acts of those who may have created the condition, but, rather, because it is responsible for its *own* negligence in failing to remedy or warn of that condition, *see Scindia*, 451 U.S. at 167-168.

Respondent's assertion that the duty which petitioner seeks to impose is a form of "non-delegable" duty is based on the argument that it would result in the vessel being held responsible for the acts of an independent contractor, *i.e.*, the acts of the loading stevedore. The flaw in this argument is that, under the *Scindia* duty, there are a variety of situations in which a vessel may be held liable for a dangerous condition which originated in the negligent act of an independent contractor, and that, under the *Scindia* duty, the origin of the condition -- whether created by an independent contractor or otherwise -- is simply irrelevant once it is determined that the vessel knew or had reason to know of the existence of the condition.

By way of example, much of the repair and maintenance work on ships is done by independent contractors. For

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[2](...continued)
F.2d 490 (3rd Cir. 1987), neither *Ruffino* nor *Teofilovich* held that the shipowner had *no* duty of inspection with respect to the condition of a cargo stow, and *Ruffino* specifically recognized that shipowner could be held liable for conditions of which it had "constructive" as well as "actual" knowledge, *see* 559 F.2d at 862.

instance, if a steel railing on a ship were to break, or a metal cat walk were to be damaged, repair of these conditions would require the services of a welder. Ships do not normally have welders as crew members, and where welding is needed, an independent contractor normally is hired to make the repairs. If the welder does not do his work properly, and the broken railing or cat walk is not properly fixed, and, as a result, a longshoreman is subsequently injured, the vessel can not escape liability for the defective condition of the rail or cat walk by asserting that it was relying on the welder to do the repairs properly. Rather, under *Scindia*, the shipowner still would have its *own* duty of inspection, and would be liable for its *own* negligence in failing to remedy or warn of the condition.[3]

In this same vein, the cargo gear on today's ships usually are electrically or hydraulically powered winches or cranes. While some repair and maintenance work on such winches or cranes may be within the competence of the ship's crew, the repair of more serious break downs may require the services of specially trained mechanics, normally provided by independent contractors. Here again, if such repair work is not done properly and, as a result, a longshoreman is subsequently injured, the shipowner can not escape liability to the injured longshoreman on the grounds the defective

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[3]Compare *Hendrick v. Daiko Shoji Co., Ltd., Osaka*, 715 F.2d 1355 (9th Cir. 1983), in which a shipowner was held liable for injuries resulting from a defective splice in a wire cable. The shipowner had not done the splicing; rather, it had purchased the cable from the manufacturer already spliced. Even though the shipowner did not do the splicing, it was nonetheless held responsible for inspecting the splice before turning the cable over to the stevedore. The Court stated, 715 F.2d at 1357:

> "Where the shipowner itself supplies equipment, it has a duty to inspect the equipment before turning it over for use by the stevedore. *Scindia, supra.*"

condition of the winch or crane was caused by the negligence of the mechanic who was hired to make the repairs. Rather, under *Scindia*, the shipowner remains liable for its own negligence in failing to discover and remedy or warn of the defective condition.

Throughout the brief submitted by respondent, and even more so in the *amicus* brief submitted by the American Institute of Merchant Shipping ("AIMS"), the assertion is made that the duty which petitioner is urging would require the shipowner not only to "inspect," but to "supervise" the work of the loading stevedore. This use of the word "supervise" to characterize the shipowner's duty, to whatever extent it connotes something more than a reasonable "inspection" of the cargo loading operation, is the creation of counsel for respondent and counsel for the *amicus*, and does not accurately reflect petitioner's position. Rather, as is clearly and succinctly stated in Petitioner's Brief, at page 27, the shipowner's duty is to make "reasonable," not "continuous," inspections of cargo loading operations.

As is set forth in Petitioner's Brief, at pages 26-27, and, significantly, is neither denied, nor even commented on, in the briefs of respondent or *amicus* AIMS, it already is the custom and practice in the maritime industry for the crews of ships to observe cargo loading and unloading operations while they are in progress. Whether one characterizes such observations as being "inspections" or "supervision," the fact of the matter is that they are made. The duty which petitioner is urging would require shipowners to do no more than that which they are already doing, and the effort to pin the label of "supervision" on this should not be allowed to obscure the reality of what actually is being done. In point of fact, the duty which petitioner is urging is not one of "supervision" as that term is

commonly understood, but rather is a duty of reasonable "inspection," -- the same duty which this Court adopted in *Scindia*.[4]

2. The Ninth Circuit's decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), correctly applied the principles set forth in this Court's decision in *Scindia*.

Both respondent and *amicus* AIMS devote a considerable portion of their briefs to attacking the Ninth Circuit's decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), on a variety of grounds. These attacks are without merit, as a review of the *Turner* decision discloses that it correctly applied the principles set forth in this Court's decision in *Scindia*. We will respond to these attacks on the *Turner* decision in the order that they are raised in Respondent's Brief.

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[4]There is ample evidence that the practice of having the crew observe cargo operations, both in the loading and unloading ports, was followed by the crew of respondent's vessel in the instant case (J.A. 22-25). Respondent, in its brief, at page 3, attempts to explain this away by asserting that the crew members were observing the cargo loading operations only for purposes of "protecting the ship" and not for purposes of inspecting or supervising the details of the stevedore's cargo loading operations. However, this assertion was contradicted by the testimony of the ship's Captain that, if plastic had been placed under the stow of cocoa beans, the crew members who were on deck observing the cargo loading operation would have seen it and reported it to him, and that he then would have directed that it be removed (J.A. 23-24), thereby clearly establishing that, at least to this extent, one of the purposes of having the crew members observe the cargo loading operation actually was to supervise what the stevedore was doing.

a. The Turner decision does not "encroach" on the legislative intent that shipowners be held liable only for their own negligence.

Respondent initially attacks *Turner* on the grounds that it is in conflict with the 1972 Act's legislative history in that it imposes a duty on the shipowner to supervise the work of the loading stevedore and would hold the shipowner liable for the negligence of the loading stevedore. While we have already addressed similar arguments in Section 1 of this Reply Brief, a review of the *Turner* decision discloses that respondent and *amicus AIMS* have simply misread the decision.

Turner was tried as a jury trial before a Magistrate Judge. At the conclusion of the evidence, the Magistrate instructed the jury, consistent with the principles set forth in *Scindia*, and the duty being urged here, that the vessel ". . . would be liable to plaintiff if the master of the vessel knew or in the exercise of reasonable care should have known of the defective stow and the danger it posed," see *Turner*, 651 F.2d at 1302. The jury returned a verdict for the plaintiff which the Magistrate set aside. On appeal, the Ninth Circuit reversed and reinstated the verdict for the plaintiff. In so doing, the Ninth Circuit did not hold that the shipowner had a duty to "supervise" the operations of the loading stevedore, or that the shipowner was liable for the negligence of the loading stevedore. Rather, it held only that the evidence was sufficient to sustain the jury's finding that the ship's master "knew or in the exercise of reasonable care should have known" of the defective stow and the danger it posed, see *Turner*, 651 F.2d at 1305. This was a factual issue, limited to the evidence in the case, and at no point did the Ninth Circuit promulgate as a general principle of law that the ship would be liable for the negligence of a loading stevedore or

had general duty to supervise the operations of the loading stevedore.

What the Ninth Circuit did hold in *Turner* was that the 1972 Act did not bar a shipowner from suing a loading stevedore who was not the employer of an injured unloading longshoreman, and that, in these circumstances, it was not the intention of Congress to leave the injured unloading longshoreman without a damage remedy against the vessel, as the vessel would be in a better position than the injured longshoreman or his stevedore employer to take action to prevent the creation of dangerous conditions in a cargo stow, *see Turner*, 651 F.2d at 1304. Given the clear statutory language which only bars the shipowner from suing the longshoreman's employer, and not other stevedores, coupled with the expressed intention of Congress that the Act be interpreted in a manner which would encourage vessel safety, the *Turner* decision hardly can be considered a "judicial encroachment" on the role of the legislature.[5]

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[5]Respondent also argues that, since Congress did not mention imposing liability on vessel owners for the negligent acts of a foreign loading stevedores in the Acts's legislative history, the courts should not do so, *see* Respondent's Brief, at page 18. This argument fails for several reasons. First, as noted at several points in this brief, under the *Scindia* duty, and the duty being urged here, liability is not imposed on the vessel for the negligence of the loading stevedore. Rather, liability is being imposed on the vessel for its own negligence in failing to remedy a dangerous condition of which it knows or, in the exercise of reasonable care, has reason to know. Second, the legislative history is not silent on the point; instead, consistent with the provisions of land-based law, the legislative history speaks in terms of the existence of a dangerous "condition," not who created the condition. Thus, the legislative history states:

> "Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous *condition*."

(continued...)

b. Turner's factual assumptions are valid.

(i) Ability to sue.

In Turner, the Ninth Circuit noted that the 1972 Act, while barring the ship from suing an injured longshoreman's stevedore employer, did not bar the ship from suing a foreign loading stevedore, and in *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442, 1446 (9th Cir. 1993), the Ninth Circuit noted that the possibility of such a suit would furnish an incentive for the foreign stevedore to do its work carefully. In an effort to undermine the *Turner* and *Riggs* decisions, respondent argues, without any supporting authority, that the right to bring such a suit may not always be available to a shipowner (1) because the vessel may not have regular contact with the port where

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[5](...continued)

(House Report No. 92-1441, 1972 U.S. Code Cong. and Adm. News 4698, at 4704)(Emphasis supplied)

Respondent also argues that the position petitioner is urging is inconsistent with the legislative history because it would apply to dangerous conditions created by American loading stevedores who are "stevedores subject to the Act" and, therefore would not be subject to suit by the vessel, *see* Respondent's Brief, page 19, f.n. 13. However, the reference in the legislative history to "stevedores subject to the Act" should be read in the context in which it is used as referring to the longshoreman's "employer" stevedore. While the term "employer" as defined in Section 2(4) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C § 902(4), can be broadly interpreted as referring to all American stevedores, whether or not they are the employer of a particular injured longshoreman, this broad interpretation has been rejected, and the term "employer," has been interpreted as referring only to the stevedore who was the actual employer of the injured longshoreman, *see Cooper Stevedoring Co. v. Kopke*, 417 U.S. 106 (1974). Therefore, for purposes of the duty at issue here, an American loading stevedore who is not the employer of the injured longshoreman would not be a stevedore "subject to the Act" and would be subject to suit by the vessel just the same as a foreign loading stevedore, *Ibid.*

the loading stevedore is located, or (2) the loading stevedore may be a government entity immune from suit under the doctrine of sovereign immunity. Relying on these unsupported assertions, respondent criticizes the *Turner* Court for assuming that both the right and the ability to sue the loading stevedore would be available to the vessel. However, the *Turner* Court can hardly be faulted for this because, if its assumptions were in any way in error, it was the responsibility of counsel for the shipowner to so inform the Court, something which counsel for the defendants in *Turner* apparently (and probably wisely) chose not to do because the defendant ship charterer in *Turner* was Japan Lines, Ltd. and the loading stevedore was a Japanese stevedore, located in Japan, *see* 651 F.2d at 1301, a country where government ownership of commercial businesses is not common.

Moreover, even if it were true that, in some individual cases, a shipowner might find it difficult to sue a loading stevedore, this would not undermine the reasoning of *Turner* or *Riggs*, for, as between a shipowner and an injured longshoreman, whether or not the shipowner may be able to bring suit against the loading stevedore would not change the fact that the shipowner's liability is based on the shipowner's own negligence, and not on the negligence of the loading stevedore, and in these circumstances, any risk of loss arising from inability to sue the foreign stevedore should be borne, not by the injured longshoreman, but by the shipowner who contracted with the foreign stevedore.

(ii) The vessel's ability to ensure safety.

Respondent next argues that the *Turner* decision should be rejected because, contrary to the assumption of the *Turner* Court, a shipowner may not always have the ability to choose a reliable foreign stevedore or the ability to supervise its

work. Respondent asserts, even though there is absolutely no factual evidence in the record to support the assertion, that in many countries shipowners have to use stevedores who are assigned to them, and that they have no right to intrude in the work of these stevedores. If one were to believe what respondent is saying, the poor shipowner is simply at the mercy of the foreign stevedore, without any ability to control how cargo is being loaded aboard its ship, *see* Respondent's Brief, pages 21-22.

One wonders if this respondent, or any shipowner, would claim that it is so helpless in its dealings with foreign loading stevedores if what was at issue was not possible injury to an unloading longshoreman but damage to the ship's cargo or to the ship itself by the loading stevedore. Would this respondent, or any shipowner, stand idly by if the longshoremen loading cargo aboard its ship were damaging the cargo, or breaking or damaging the ship or its equipment, or loading cargo in the wrong place on the ship, or in any other manner failing to perform their work properly? And at what port, even in the countries listed in respondent's brief, would the local authorities insist that a shipowner accept a stevedore the ship believed to be incompetent? And would any shipowner continue to go to a port where his only choice was to accept the work of an incompetent stevedore? Contrary to respondent's assertion, the ship always has a choice, and always has the ability to control the activities of those who come aboard the ship, and one can be sure that this is true even in those ports where the government assigns the stevedore.

Respondent also makes the unsupported assertion that crew members of a ship are not and do not purport to be experts in cargo handling or stowage, *see* Respondent's Brief, page 22. One should try telling this to a ship's Captain or

Chief Mate. While it may be true that longshoreman are more expert than members of a ship's crew in the performing the physical work of loading cargo, the same is not true when it comes to methods of handling cargo or the proper stowage of cargo. When it comes to methods of handling cargo or the proper stowage of cargo, the officers of a ship, in the person of the ship's Captain and Chief Mate, are at least as expert, if not more expert, than stevedoring personnel. Indeed, they have to be, for it is the Captain and the Chief Mate, not the loading stevedore, who are responsible for the safety of the ship and the safe delivery of its cargo. For this reason, no Captain or Chief Mate will take a ship to sea unless and until they are satisfied that the cargo they are carrying is properly and safely stowed. Respondent's assertion that the ship's crew is not expert in the handling and stowage of cargo, which is made without any supporting testimony or authority, is simply not true and is a statement which would be promptly rejected by any ship's Captain or Chief Mate.

c. Safety concerns.

Finally, respondent attacks the *Turner* decision on the grounds that its holding that a shipowner is responsible for dangerous conditions existing in a cargo stow would not encourage vessel safety. Instead, respondent asserts that the *Turner* holding defeats vessel safety because, according to respondent, most cargo accidents are caused by the discharging stevedore's negligence, *see* respondent's brief, page 24. This argument is without merit for several reasons.

First, respondent's assertion that a review of the reported cases dealing with cargo accidents reveals that negligence of the stevedore employer was the primary if not sole cause of the accident, *see* Respondent's Brief, at page 23, is without any statistical or other support, and is meaningless because it

doesn't take into consideration cases which are unreported or may have been settled (and, inevitably, it is only the doubtful or difficult cases that are tried). Secondly, under the *Scindia* duty, the shipowner's obligation would be to provide a ship whose cargo was in such condition that it could be discharged by an expert and experienced stevedore with reasonable safety. Therefore, if an accident is caused "solely" by the negligence of the stevedore, then the ship is not liable under *Turner* or any other decision. Third, as to cases where, according to respondent, even though the shipowner is at fault to some degree, the employer stevedore is "primarily" at fault, such "primary" fault simply does not and should not excuse the shipowner from liability for its own negligence, *see Edmunds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). Since a shipowner will not be held liable to an injured longshoreman unless its negligence is found to have been a proximate cause of the accident, judgments as to "primary" and "secondary" negligence are irrelevant to an injured longshoreman who would not have been injured in the absence of the negligence of the ship.

3. In *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), the Fifth Circuit held that the *Scindia* duty of care, including the *Scindia* duty of inspection, extended to dangerous conditions existing in a cargo stow.

Respondent devotes a considerable portion of its brief to developing an intricate interpretation of the Fifth Circuit's decision in *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), which would permit it to be distinguished from the instant case. This effort fails, as *Woods*, like *Turner*, is on all fours with the position here being urged by petitioner.

Notwithstanding respondent's complex analysis of the Fifth Circuit cases which led to the *Woods* decision, the best evidence as to what the Fifth Circuit meant in *Woods* is what it said, and what it said is quite clear.

At the time the Fifth Circuit decided *Woods*, the Third Circuit already had decided *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), on which the decision below in the instant case was based. The shipowner, in *Woods*, urged the Fifth Circuit to follow *Derr*, an invitation which the Fifth Circuit declined, stating, 873 F.2d at 848:

> . . . the defendants thus urge us to follow *Derr*'s lead and hold that a vessel cannot be held liable for injuries resulting from the negligence of an independent stevedore.
>
> Our court, however, has already visited this question and reached the opposite result.

Thus, no attempt by respondent at analyzing *Woods* and its predecessor Fifth Circuit cases can alter the fact that the Fifth Circuit, in *Woods*, clearly intended to and did reject *Derr*. Moreover, the Fifth Circuit, in *Woods*, went much further than simply rejecting *Derr*; it went on to specifically adopt the duty which petitioner is urging here, stating, 873 F.2d at 850:

> As noted, *supra*, it is the law in this circuit that, under the first *Scindia* duty, a vessel interest has an obligation to exercise due care to ensure that the vessel's cargo is loaded such that it can be discharged with reasonable safety. The defendants may be found liable "for damages arising from a dangerous stow *[in]*

situations where the [defendants] knew or should have known of the dangerous condition." (Emphasis supplied)

Thus, as the foregoing quoted language indicates, and contrary to the assertions in Respondent's Brief, at pages 26 and 35, the Fifth Circuit, in *Woods*, did hold that a shipowner would be charged with knowledge of dangerous conditions in a cargo stow of which it knew or had reason to know, precisely the duty being urged here.

4. The right of a stevedore employer to recoup its compensation lien from a longshoreman's damage recovery does not reduce the employer's incentive to initiate and enforce safe work practices.

Respondent advances the argument that a shipowner should not be held liable for dangerous conditions in a cargo stow because, if the ship is found liable, the stevedore employer will recover its compensation payments even though the stevedore's negligence may have contributed to the happening of the accident, and, therefore, the stevedore will have no incentive to initiate and enforce safe work practices, see Respondent's Brief, at pages 25-26. Aside from the fact that a similar argument already has been rejected by this Court, *see Edmunds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), in the context of accidents resulting from dangerous conditions in a cargo stow, this argument is both unrealistic and illogical.

If a longshoreman is injured in the course of cargo operations, his stevedore employer has an immediate and absolute obligation to pay him workmen's compensation benefits. However, before an injury occurs, neither the longshoreman nor his stevedore employer know that an

accident is going to happen. Consequently, neither the longshoreman nor his stevedore employer have any way of knowing in advance whether any particular accident will give rise to a suit against a ship, whether any recovery will be made in that suit, or how much that recovery will be. As a result, the ability of an employer to recoup its compensation lien in any particular case will always be doubtful and in the future, while the employer's obligation to pay compensation benefits will be immediate and certain. Given this immediate and certain obligation to pay compensation benefits, no employer is going to reduce or limit its efforts to prevent accidents because there is a possibility that, at some time in the future, those payments may be recouped. Imposing liability on shipowners for dangerous conditions in cargo stows will not reduce the incentive on stevedore employers to implement safety programs, but not holding shipowners responsible for dangerous conditions in cargo stows certainly will eliminate any and all incentive on the shipowner to do its part in eliminating dangerous conditions from cargo stows.

5. The fact that a dangerous condition in a cargo stow is "open and obvious," or capable of being discovered by the unloading stevedore, does not relieve the shipowner from liability if the condition of the cargo is such that it can not be discharged with reasonable safety.

While not directly involved under the facts of the instant case, both respondent and *amicus* AIMS argue that a shipowner should not be liable for a dangerous condition in a cargo stow if that condition is "open and obvious" or capable of being discovered by the unloading stevedore, *see*

Respondent's Brief, pages 24, 47.[6] However, the argument that the vessel should not be liable for "open and obvious" conditions was considered and rejected by this Court in *Scindia*, *see* 451 U.S. at 167-168, and since *Scindia* was decided, it has been rejected by both the Fifth and Ninth Circuits in cargo stowage cases, *see Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), and *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442, 1446 (9th Cir. 1993).

Whether a given dangerous condition in a cargo stow is one which is capable of being discovered by the unloading stevedore is neither a separate legal nor a separate factual issue; rather, it is part of the broader factual issue encompassed within the ship's *Scindia* duty to warn the stevedore of conditions which "would not be obvious to or anticipated by him [*i.e., the unloading stevedore] if reasonably competent in the performance of his work,*" Scindia, supra, 451 U.S. at 167.

Under *Scindia*, the duty to warn and the duty to provide a ship which is in such condition that the stevedore will be able to carry on its cargo operations with reasonable safety are part of the ship's broader duty of "reasonable care under the circumstances," *see* 451 U.S. at 166-167. The ability of the stevedore to discover and avoid or remedy any particular dangerous condition is just one of the "circumstances" which the fact finder must consider in determining whether that duty

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[6]Contrary to the assertion at page 46 of Respondent's Brief, the district court did not find that the presence of the plastic was "open and obvious" to petitioner, *see* discussion at pages 39-40 of Petitioner's Brief, nor was there any evidence that petitioner's fellow workers saw or were able to see the plastic *before* the accident, *see* discussion at page 40, f.n 18, of Petitioner's Brief.

has been breached. It certainly is not an issue which can or should be determined on a motion for summary judgment.

In this context, the duty to warn can not really be separated from the duty to provide a safe ship. If a dangerous condition is concealed, *i.e.*, not "open and obvious," then the shipowner who knows or has reason to know of the condition has a duty to give warning of it. However, if the condition is "open and obvious," then there is no need to give separate warning of it because the fact that it is "open and obvious" itself constitutes the warning. However, *depending on the circumstances, whether* any particular condition is sufficiently apparent to be considered "open and obvious," may itself be a factual issue which can not be determined on a motion for summary judgment.

In addition, again depending on the circumstances, some dangerous conditions aboard a ship, be it a condition of the cargo or a condition of the ship or its equipment, if obvious, may be easily avoidable by the unloading longshoreman, and, in such circumstances, the ship would not be considered unsafe, *see Kirsch v. Plovidba*, 971 F.2d 1026, 1030 (3rd Cir. 1992); *Morris v. Compagnie Maritime des Chargeurs Reunis*, 832 F.2d 67, 70-71 (5th Cir. 1987). Other dangerous conditions, while obvious may not be avoidable, in which case the vessel would be liable even though the stevedore or the individual longshoreman was aware of the condition, *see McCarthy v. Silver Lines, Ltd.*, 661 F.2d 298, 299 (3rd Cir. 1981). Between these two extremes lie those situations in which the stevedore, even if aware of the condition, can not be reasonably expected to avoid the danger, in which case the vessel would remain liable for its negligence in providing a ship on which the cargo operations could not be performed with reasonable safety, *see Kirsch v. Plovidba, supra*, 971 F.2d at 1030-1031. In such circumstances, whether a

particular hazardous condition, be it a condition of the cargo or a condition of the ship or its equipment, is one which the stevedore may be reasonably expected to avoid, will be a "fact-intensive" question which can not be resolved on a motion for summary judgment, *Ibid.* at 1030.

The appropriate way to handle the issue of whether a given condition is one which the shipowner was entitled to rely on the unloading stevedore to discover and avoid is to treat it, not as part of the plaintiff longshoreman's case, but as a defense on which the shipowner, as the party urging the affirmative of the proposition, has the burden of proof, *see* United States v. R. Enterprises, 498 U.S. 292, 305 (1991) (Separate Opinion of Mr. Justice Stevens); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 589 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979). It is not an issue which the court can or should resolve on motion for summary judgment.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in petitioner's initial brief, it is respectfully submitted that the decisions below should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

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No. 93-670

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ALBERT HOWLETT,
Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 26 and Rule 37 of the Rules of the Supreme Court of the United States, the National Association of Waterfront Employers moves for leave to file a brief *amicus curiae* in support of Petitioner, Albert Howlett.

The National Association of Waterfront Employers (NAWE), formerly the National Association of Stevedores (NAS), is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade association organized under the laws of the District of Columbia whose member companies are privately owned stevedores, marine terminal operators, and other related waterfront employers. NAWE member companies do business at most U.S. ports on the Atlantic

and Pacific coasts, the Gulf of Mexico, the Great Lakes, the States of Alaska and Hawaii, and the Commonwealth of Puerto Rico. With the exception of the Puerto Rico members every NAWE member company employs longshore labor (such as Petitioner, Howlett) engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

Amicus members constitute the majority of self-insured and insured stevedore and marine terminal operating companies subject to the LHWCA and are concerned with job injuries sustained by their employees engaged in maritime employment on land and on vessels, the payment of compensation when due, and the recovery of damages from third parties, when appropriate under the circumstances of the case. In the instant case, *amicus* stands in the shoes of Petitioner, Howlett's employer, Northern Shipping Co., on the date of the injury.

Petitioner Howlett has consented to the filing of a brief *amicus curiae* by NAWE in support of the Petitioner.

Accordingly, *amicus* respectfully moves for leave to file the attached brief amicus curiae in support of Petitioner.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Does not the shipowner's duty of care owed to a longshoreman under § 5(b) of the Longshore and Harbor Workers' Compensation Act extend to unsafe conditions existing in cargo stow of which the shipowner knows or has reason to know, and which are unknown to the longshoreman and his stevedore employer, are not open and obvious, and would not normally be anticipated?

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The member companies of N. WE, *amicus curiae,* are employers of longshoremen and harbor workers such as Petitioner, Albert Howlett, and as such stand in the shoes of Mr. Howlett's employer, Northern Shipping Co. As such, *amicus'* members not only are obliged to pay compensation to workers injured aboard vessel's pursuant to the LHWCA, but they are also entitled to bring actions against third party tortfeasors, such as Respondent Birkdale for damages they incur as employers because of an injury to their employees caused by third parties. One source of action is § 33 of the LHWCA (33 U.S.C. 933) or the assertion of the lien for compensation paid as authorized by § 33, should Mr. Howlett ultimately prevail herein.

But *amicus* has another stake in this case. If Mr. Howlett has claimed compensation from his employer under the LHWCA (which he has), and the employer has or is paying LHWCA benefits (which it has), and if the employer was an authorized LHWCA self-insurer under § 32 of the LHWCA (which it was at the time of injury), and the employer subsequently files for bankruptcy (which it did), then when the collateral the employer has with the Secretary of Labor under § 32 is exhausted, NAWE self-insured member companies will have to each pay a portion of Mr. Howlett's compensation due from his former employer (LHWCA §§ 18 and 44) (33 U.S.C. §§ 918 and 944) through increased assessments to the LHWCA Special Fund. (See Appendix)

Finally, any decision of this Court with respect to the duties owed by a shipowner to a longshoreman or the longshoreman's employer directly impacts upon all NAWE member companies. Those duties, as this Court held in *Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd., infra,* are very similar, but not identical. The attached brief of *amicus* therefore will present similar but not identical argument as Petitioner. Our ultimate interests are the same, to be sure, but the approach of *amicus* is predicated upon more than § 5(b) of the LHWCA.

STATMENT OF THE CASE BELOW

Albert Howlett, a longshoreman at the time of his injury employed by Northern Shipping Co., was injured while engaged in the *unloading* of cocoa beans from the M/V PRESIDENTE IBANEZ, owned and operated by respondent, Birkdale Shipping Co., SA ("Birkdale"). The cocoa beans had been loaded on the vessel by a stevedore, not Mr. Howlett's employer, in Ecuador for unloading in Philadelphia by Mr. Howlett's employer. Amongst the other remedies available to him, Mr. Howlett filed an action in negligence against respondent Birkdale pursuant to § 5(b) of the Longshore and Harbor Workers' Compensation Act [33 U.S.C. § 905(b)

("LHWCA")] in the U.S. District Court for the Eastern District of Pennsylvania (CA No. 91-7978) which granted Birkdale's motion for summary judgment predicated on a prior decision of the U.S. Court of Appeals for the Third Circuit in *Derr v. Kawasaki, K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. den.*, 486 U.S. 1007 (1988). Without written opinion the Third Circuit affirmed the grant of summary judgment.

This Court granted Mr. Howlett's petition for writ of *certiorari* on the question of what duty does a shipowner owe to a longshoreman under § 5(b) of the LHWCA in connection with cargo stowed in the vessel. *Amicus* suggests that that question must encompass the shipowner's duty to the injured longshoreman's employer, the contract stevedore. The duties are substantially the same, but they are not identical.

SUMMARY OF ARGUMENT

The precedent case upon which the district court predicated its grant of summary judgment of Respondent, affirmed without opinion by the Third Circuit Court of Appeals, was seriously flawed and misinterpreted this Court's controlling decisions. The courts below misapplied this Court's decisions concerning the shipowner's duties with respect to ship *loading* to cases involving ship *unloading*. The circumstances of the operations are significantly different. The uncontroverted evidence shows that Respondent negligently breached its duties enunciated by this Court in an unbroken line of decisions. In addition Respondent negligently failed to inform its *unloading* contract stevedore of a significant material fact when the stevedoring contract was negotiated. Finally, Respondent negligently breached its statutory non-delegable duty to properly load and stow the cargo upon which Petitioner was injured.

Each and every breach of Respondent's several duties was the proximate cause of Petitioner's injury and the

proximate cause of damages (the cost of workers' compensation paid and to be paid) incurred by Petitioner's employer. The decisions below must be reversed with instructions that, with respect to cargo previously loaded (stowed) in a ship by one employer for subsequent *unloading* (discharge) by another employer, the cargo itself constitutes the work space of the ship within the meaning of this Court's prior decisions.

ARGUMENT

Until now all parties agree that the ultimate decision below in this case is predicated on the Third Circuit's decision in *Derr, supra* and its interpretation of this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981). In effect, it is *Derr* and its misinterpretation of *Scindia* that are now before the Court.

I. THE THIRD CIRCUIT HAS MISINTERPRETED *SCINDIA*

Amicus submits that *Derr*, which was concerned with two longshoremen injured during two distinct vessel *unloading* processes is seriously, if not fatally, flawed and is based on a clear misreading of this Court's decision in *Scindia*. In *Derr*, at 835 F.2d 492, the Third Circuit said that "*Scindia* involved a longshoreman who was injured in an unloading operation as the result of a defective winch that was part of the vessel's equipment being operated by the stevedore." It did not. Mr. De Los Santos was injured during the *loading* process, *Scindia* at 451 U.S. 160, as was Gordon McNeill before him in *Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd.*, 394 U.S. 404 (1969). Had the Third Circuit recognized that *Scindia* and *Burnside* dealt only with ship loading, not unloading, it might have arrived at the same result as the Fourth, Fifth and Ninth Circuits with respect to unloading. (*See Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070 (4th Cir. 1982), *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. den.*, 493 U.S. 1050 (1990), *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981) and *Riggs v. Scandia Steam Navigation Company, et al.* (No. 92-55139) —— F.3d —— (9th Cir. 1993).

But we need not dwell on speculating what the Third Circuit might have done had it read *Scindia* correctly and recognized that *ship loading and unloading are different operations presenting different circumstances in each case.* The general rule stated in *Scindia*, which affirmed the rule stated in *Burnside, supra*, which followed the rule stated in *Kermarec v. Compagnie General Transatlantique*, 358 U.S. 625, 632 (1958), is, quoting from *Burnside* at 394 U.S. 415:

> "The owner of a ship in navigable waters owes all who are on board for purposes not inimicable to his legitimate interests the duty of exercising reasonable care under the circumstances of each case."

In addition, the *Kermarec* Court's decision indicates at 358 U.S. 631 that the same general rule applies under the common law; namely that the owners and occupiers of property owe a single duty of reasonable care in all the circumstances to those on the property for legitimate purposes.

In both *Burnside* and *Scindia* this Court simply applied the general rule to the circumstances of each ship *loading* case before it. With respect to longshoremen, reasonable conduct on the part of the shipowner is governed by § 5(b) of the LHWCA which requires the shipowner to be non-negligent. That means, non-negligent in the light of the circumstances of the particular incident. *Amicus* stresses the difference betwen ship *loading* and *unloading* because, although there are similarities between the two operations, there are significant differences. Differences which this Court properly did not consider in either *Scindia* or *Burnside* because they—(*unloading operations*)—were not before the Court.

II. THE CARRIAGE OF GOODS BY SEA ACT (COGSA)

When a ship arrives in a U.S. port to *unload or discharge* cargo stowed in it that ship already will have incurred a non-delegable duty imposed on it by another federal law in addition to its duties imposed by the LHWCA. That non-delegable duty (really a bundle of such duties) is to be found in § 3(2) of the Carriage of Goods By Sea Act (COGSA), [46 U.S.C. § 1303(2)], which provides:

> "(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

By law the carrier, here respondent Birkdale, has a non-delegable duty to see that the cargo is properly stowed, and the carrier may not insulate itself from liability by the use of independent contractors. Any failure by the independent contractor to care for the cargo is also a failure by the carrier. *Agrico Chemical Co. v. SS ATLANTIC FOREST*, 459 F. Supp. 638 at 647, and cases cited therein, affirmed 620 F.2d 487, 488 (5th Cir. 1979).

Some may argue that COGSA only applies to shipowner and cargo interests; but does it? COGSA requires the shipowner (carrier) to insure that the cargo taken on board is loaded carefully and properly and is carefully and properly stowed within the ship. While the shipowner may think it has no obligation to supervise the operations of the loading stevedore, the carrier has a statutory non-delegable duty to ensure that the completed operation of the stevedore results in carefully and properly stowed cargo. It is the status of the final stow for which the shipowner has the inescapable duty. Failure to carry out that duty is negligence. Immediately foreseeable consequences of improper cargo stowage are (1) damage to the cargo and other cargo around it, and (2) damage to the ship itself. But equally foreseeable consequences to

improperly stowed cargo are (1) the discharging (unloading) stevedore may encounter unexpected, difficult and more costly requirements to safely unload the cargo, and (2) some discharging (unloading) longshoreman could be injured because of the improperly stowed cargo.

But for the failure of the shipowner, Respondent Birkdale, to fulfill its COGSA duties with respect to the cargo petitioner Howlett might not be before this Court. *Amicus* submits that Birkdale had a statutory non-delegable duty to ensure that the cargo was properly loaded and stowed and to warn the discharging stevedore, Northern Shipping, Howlett's employer, if it was not. Howlett could have been alerted to the presence of the plastic and could have avoided his injury. Under the circumstances of this case, Birkdale had both a duty to inspect and a duty to warn. It apparently did neither, and in both respects was negligent.

Because of its reliance on *Derr* the district court never reached the issue of whether the cocoa bean were properly stowed. There is evidence in the record that they were not, and had the master been aware of the use of plastic instead of paper he would have ordered the loading stevedore to use paper. Respondent admits that (Page 2, Respondent's Brief in Opposition to the Petition for Writ of Certiorari). *Had the master fulfilled his non-delegable duty under COGSA he would have been aware of the use of plastic.* Obviously, the master and everyone else on the ship when it was being loaded and before it set sail took no steps to ensure that the cargo was carefully and properly stowed.

III. THE FOURTH, FIFTH AND NINTH CIRCUITS GOT IT RIGHT

Amicus submits that, like the Fourth and Fifth Circuits, the Ninth Circuit got it right in *Riggs, supra,* and would like to comment on the reservations expressed in Circuit Judge Rymer's concurring opinion. Much of that con-

cern appears to have been addressed by this Court in *Burnside*. The shipowner is subject to at least two federal legal regimes. One is the LHWCA and the other is COGSA. As *Burnside* points out, the duties to the employer-stevedore are not the same as the duty to the employee-longshoreman. However, the breach of a duty to one can result in injury to either or both. As the Court said at 394 U.S. 415:

> "The owner of a ship in navigable waters owes to all who are on board for purposes not inimicable to his legitimate interests the duty of exercising reasonable care under the circumstance of each case. That duty of care imposed by law extends to the stevedoring company as well as to others lawfully on the ship, and its breach gives rise to a cause of action for any damages proximately caused. It is not disputed, for example, that if the shipowner's negligence caused damages to the stevedoring contractor's equipment, those damages would be recoverable in a direct action sounding in tort. We can see no reason why the shipowner's liability does not extend to the foreseeable obligations of the stevedoring contractor for compensation payments to the representative of a longshoreman whose death was occasioned by the shipowners breach of his duty to the stevedoring contractor."

The duty to properly and carefully *load and stow cargo* of § 3(2) of COGSA has nothing to do with the doctrine of "seaworthiness." COGSA provides for that in § 3(1)(a). COGSA § 3(2) *and* the LHWCA's § 5(b) speak of negligence. The 1972 amendments to the LHWCA as well as the 1984 amendments did not amend COGSA and did not affect this Court's decision in *Burnside*. The basis of petitioner Howlett's claim is Birkdale's negligent stow of the cocoa beans and its failure to warn anyone of the condition of the stow; a claim clearly provided for by the 1972 amendments to the LHWCA.

In fact, suits *in negligence* against a carrier (shipowner) by a longshoreman injured during the *unloading* process were permissible even before the 1972 amendments to the LHWCA, *Weyerhaeuser S.S. Co. v. Nacerima Operating Co., Inc.*, 355 U.S. 563 (1958) in which an unloading longshoreman was injured by a temporary structure that was on the ship when the ship arrived at the loading port. After trial the jury found that the shipowner had been negligent, and found for the longshoreman on that issue. *Id.* at 564. In commenting on the jury's verdict, which was not before it for review, having been previously satisfied, this Court said at 568:

> "While the jury found petitioner [Weyerhaeuser] 'guilty of some negligence,' that ultimate finding might have been predicated, *inter alia*, . . . or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition."

Therefore, amicus submit that the concern expressed by the concurring opinion in *Riggs, supra* is unfounded. See also *Edmonds v. Compagnie General Transatlantique*, 443 U.S. 256 (1979) involving a longshoreman injured during the unloading operation. The issue of a longshoreman injured while upon cargo already stowed aboard a ship in another port is not new to the Court. In *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., et al.*, 417 U.S. 106 (1973) the Court had before it the question of apportionment of damages to an injured longshoremen between the loading stevedore, who was not the employer of the injured longshoreman, in a different port from that of the accident and the shipowner.

The *Cooper* Court noted in footnote 2, *Id.* at 107 that the incident occurred before the 1972 amendments to the LHWCA and that all parties thereto had agreed that

the 1972 amendments, which eliminated the "seaworthiness" of the ship as a basis for suit by the injured longshoreman, did not apply in that case. It appears that the suit against the ship alleged both negligence and unseaworthiness on the part of the shipowner. The trial court found that the cargo stow resulted in an unsafe place to work and an unseaworthy condition, *Id.* at 108, and then apportioned damages between the loading stevedore and the shipowner. This Court affirmed. *Amicus* submit that *Cooper* remains good law after the 1972 amendments to the LHWCA. The only change applicable here is that now the injured worker must prove negligence by the shipowner. *Cooper* clearly indicates that the shipowner has a duty to "make adequate arrangements to assure that the cargo stow . . ." not result in an unsafe place to work, *Id.* at 108. Nothing in the 1972 amendments to the LHWCA changed that.

IV. SCINDIA APPLIED TO THE CIRCUMSTANCES OF THIS CASE

We now return to *Scindia*, this Court's latest statement on the duties owed by a shipowner to all aboard its ship for a legitimate purpose. Those duties, *Id.* at 166-7, include:

> "The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and *work space* to be used in the stevedoring operations; and if he fails *at least* to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman." (Emphasis supplied).

The first question that must be addressed is what is "work space to be used in the stevedoring operations." In the case of vessel loading, as in *Burnside* and *Scindia* it is the hold of the vessel which is to be loaded. The Third Circuit in *Derr*, *supra* at 835 F.2d 495 says that it construes the language to refer to the "physical" work

space. *Amicus* submit that if the circumstances in a particular vessel unloading case require the longshoremen employed by the stevedore to go upon the stowed cargo in the course of a reasonably competent unloading operation, *the cargo itself is a physical work place.* It is the cargo within the hold of the vessel which defines the actual work space within which the longshoremen work, not the bulkheads and deck of the cargo hold, during most of the unloading operation. And, as discussed above, it is the non-delegable duty of the shipowner/carrier to insure that the cargo is carefully loaded and stowed in the vessel. This is not to claim that the ship owner has the duty to supervise every step of the loading process, but it plainly has a duty to insure that the completed operations of the loading stevedore satisfy the carrier's responsibilities under COGSA and the non-negligence requirement of the LHWCA.

The second question is what is "a hidden danger which would have been known to him [the shipowner] in the exercise of reasonable care." *The answer is the stowage of the cargo.* In the proper exercise of its COGSA non-delegable duties the shipowner should know the nature of the cargo loaded and to be subsequently unloaded and the manner in which such cargo is stowed. If the shipowner does not fulfill its COGSA duties but simply looks the other way during the loading operation, the shipowner still remains liable for any damage or injury for which its breach of a statutory non-delegable duty (negligence) is the proximate cause.

Cargo stowage is hidden to all, except the loading stevedore and the shipowner, until the vessel arrives at the unloading port and is uncovered. In most, if not all situations, the arrangements to unload the cargo from the vessel have been made long before it arrives at the port of unloading largely due to improved communications and the vessel owner/operator's desire to spend as little time and money in port as possible. The way in

which the cargo is stowed is a material fact which the shipowner has a duty to disclose to the contracting unloading stevedore in order for the latter to be able to perform its operations in the workmanlike manner prescribed by *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). *Ryan* also suggests that there is a reciprocal obligation from the shipowner to the stevedoring contractor, but did not decide that in the light of the facts peculiar to the case before it, *Id.* at 134. At least one such obligation must be the full disclosure of the nature of the work to be performed. In an unloading operation, that must include the nature of the cargo to be handled and the manner in which it has been stowed in the ship. The 5 to 4 split decision in *Ryan* was based solely on the terms of the stevedoring contract, the indemnification agreement therein between the parties, and section 33 of the LHWCA. Although the 1972 amendments to the LHWCA have mooted the question of indemnity agreements, *amicus* wonder if the result would have been the same if Pan-Atlantic's non-delegable COGSA obligations had been before the court.

In the instant case respondent admits that the nature of the stowage, i.e., use of plastic on which Howlett slipped, was only noticed (i.e., unhidden); "When the draft of cocoa beans was lifted out of the hold immediately before the alleged accident, it exposed an area that was approximately eight foot square." (Respondents Brief in Opposition pg. 4). Obviously, the unsafe or defective stowage was hidden or concealed at the time the ship was turned over for unloading operations. On the same page respondent admits that "Captain Cafena did testify, as Petitioner asserts, that "plastic should not have been used under the cargo," and on page 2, "In addition Captain Cafena testified that if any member of his crew saw plastic being used for this purpose, it would have been reported to him and he would have asked the loading stevedore to remove it immediately." The unloading operations then did not create the unsafe condition of the cargo stow. They simply revealed that which already existed and of which the shipowner should and could have long since been aware had it exercised due care.

Could Howlett's employer have reasonably expected to encounter this type of stowage? Even the Respondent says not (Brief in Opposition, page 2), to wit: "In fact, the ship's Captain, Daniel Cafena, testified that he has never seen plastic used as a separation material for cocoa beans and would not have permitted it to be used for this purpose without registering a complaint since plastic can cause condensation damage to this type of cargo." If plastic were never used, how could Northern Shipping or Mr. Howlett reasonably expect to encounter it? Captain Cafena should have known that condensation (moisture) could also cause an unloading longshoreman to slip on the plastic during the unloading operation after the voyage at sea from Ecuador to Philadelphia.

The district court's grant of summary judgment dismissing Howlett's claim based on the Third Circuit's decision in *Derr, supra* was clearly wrong, as is *Derr* itself. The jury should have been allowed to determine whether the cargo was properly stowed, whether the shipowner had actual or imputed knowledge of the manner of the cargo stowage, and whether the shipowner was negligent in not informing Howlett's employer of the nature of the cargo stow when it contracted for unloading the ship.

In short, the district court, consonant with this Court's statement of duties, should review the facts of this case in light of the several obligations of the shipowner, recognizing that the objective under the LHWCA is "placing the burden ultimately on the company whose default caused the injury, *Italia Societa per Azioni di Navigatione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964). In the instant case, Respondent Birkdale clearly is such a company.

CONCLUSION

Amicus submits that with respect to vessels which are tendered to a contracting stevedore for *unloading* (discharge) the shipowner owes, in addition to the duties prescribed by this Court in *Burnside* and *Scindia,* the duty to tender a vessel in which cargo is carefully and properly stowed, and to warn the stevedore in each circumstance when the cargo is not carefully and properly stowed, and that a breach of those duties will make the vessel responsible for all damages and injuries for which the breach is the proximate cause. *Amicus* believe that such a requirement is completely within the general duties of the shipowner expressed by this Court in *Kermarec, Burnside* and *Scindia.* The instant case should be reversed and remanded for findings in accordance with this Court's decision.

Respectfully submitted,

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APPENDIX

U.S. Department of Labor

[Feb. 7, 1994]

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Longshore and
Harbor Workers' Compensation
Washington, D.C. 20210

File Number:

Mr. Thomas D. Wilcox, Esquire
National Association of
Waterfront Employers
2011 Pennsylvania Avenue, N.W.
Suite 301
Washington, D.C. 20006

Re: Claimant: Albert Howlett
Employer: Northern Shipping Co.
Date of Injury: July 28, 1989
OWCP Case No.: 180-50-4315

Dear Mr. Wilcox:

This is in response to your letter dated February 1, 1994 concerning the above captioned case. Mr. Howlett has filed a claim for benefits under the Longshore and Harbor Workers' Compensation Act with his employer, Northern Shipping Co., an authorized self-insured employer. However, since the Northern Shipping Co. has filed for bankruptcy, the OWCP is administering Mr. Howlett's claim.

Sincerely,

/s/ Joseph F. Olimpio
JOSEPH F. OLIMPIO
Director, Division of
Longshore and Harbor
Workers' Compensation

No. 93-670

Supreme Court, U.S.
FILED
MAR 30 1994
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

ALBERT HOWLETT,
Petitioner,

VS.

BIRKDALE SHIPPING CO., S.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMERICAN INSTITUTE OF MERCHANT SHIPPING AS *AMICUS CURIAE* *In Support of Respondent*

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No. 93-670

In the Supreme Court

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OCTOBER TERM, 1993

ALBERT HOWLETT,
Petitioner,

vs.

BIRKDALE SHIPPING CO., S.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMERICAN INSTITUTE OF MERCHANT SHIPPING AS *AMICUS CURIAE*
In Support of Respondent

INTEREST OF THE AMERICAN INSTITUTE OF MERCHANT SHIPPING

Amicus curiae, American Institute of Merchant Shipping, referred to as AIMS, formed in 1969, is the nation's largest association of American shipowners and consists of 24 companies whose operations are world-wide.[1] They are

[1] Amerada Hess Corporation, American Overseas Marine Corporation, American President Lines, Amoco Transport Company, Arco Marine, Inc., BP Oil Shipping Company, U.S.A., Chevron Shipping Company, Coscol Marine Corporation, Crowley Maritime Corporation, Exxon Shipping Company, Farrell Lines Incorporated, Hvide Shipping Incorporated, Interocean Management Corporation, Maersk Line, Lim-

representative of all steamship companies that do business in the United States and are exposed as third parties to injury claims by longshoremen and harbor workers, and engaged in litigation of such claims.

This case presents an important conflict concerning the relative responsibilities of stevedores and shipowners and their insurers for the ultimate burden of compensation, under the 1972 Amendments to the Act and this Court's interpretation of it in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981). The losses reflected in this and similar cases are burdens of the shipping industry as a whole that ultimately come to a focus in the freight rates paid by shippers. AIMS believes that the interests of all concerned are best served by rules distributing those losses to the industrial entities involved, not on a merely conceptual basis, but by clear, simple and practical rules that operate with a maximum of economy and a minimum of dispute within the industry. They are concerned that Petitioner here would have the Court move sharply in the other direction.

The 1972 Amendments made a number of changes in the Act intended to shift the emphasis sharply back toward the compensation security features of the Act and away from lawsuits, whether between longshoreman and vessel or between vessel and stevedore, and, consistently with that aim, provided dramatic and much needed increases in the compensation benefits payable under the Act. Those benefits are normally insured. Members of AIMS pay the premiums for such insurance, so far as those premiums are attributable to work on their own vessels, as a distinct element of the rates they pay their stevedore contractors.

---

ited, Maritrans GP Inc., Mobil Oil Corporation, Mormac Marine Transport, Inc., OMI Corp., OSG Bulk Ships, Inc., Phillips Petroleum Company, Sea-Land Service, Inc., Sun Transport, Inc., Texaco, and Unocal Corporation.

AIMS and its members remain keenly interested in interpretations of the Act that further the broad purposes of the 1972 Amendments, by providing longshoremen with the ample benefits and long-term security that the Act provides, unburdened by a heavy overlay of attorneys' fees; by shifting the emphasis back where it belongs to the compensation features of the Act; by eliminating costly and confusing problems in the administration of the Act; and by ensuring that litigation, when it does ensue, will be equitably resolved in consonance with the overall aims of the Amendments and the distribution of loss to those generally best situated to control and compensate it.

The central issue in *Scindia* was whether shipowners were obliged to supervise the work of stevedores and other waterfront contractors, to prevent injuries to American longshore and harbor workers. Upon that question depended whether the shipping industry, including its shoreside auxiliaries, would have a practical working rule for distributing injury losses among its entities and their insurers. This Court decided that issue in a thoughtful, general and practical way that has been famously effective in securing liberal compensation for injuries, while drastically reducing litigation to determine who should pay it.

As we will show, Petitioner here seeks an exception to the rule of *Scindia* broad enough to affect almost all discharges of cargo in the United States, more than half of all stevedore operations here, an exception that would devour the rule in discharge operations. We propose to show that the *Scindia* rule remains sound and practical and that the reported deviations from it are not supported by principle.

POTENTIAL SCOPE AND IMPACT OF THIS CASE

The rule advocated by Petitioner, and embraced by the Ninth Circuit, threatens to impinge upon more than half the loading and discharge operations in the United States. This

is so because it would affect the discharge of cargo loaded abroad, which is to say, imports. In 1991, the latest year for which the figures are shown, the total of imports to all four coasts of the United States was 455,000,000 tons, while the total of exports was 394,000,000 tons.[2] Loadings and discharges of domestic cargoes are equal, by definition. Thus Petitioner's proposal would not be an exception for exceptional cases, but the prevailing rule in its operational and financial impact, contrary to what the industry has understood since 1972 and considered confirmed by this Court in 1981, and to which the economic relations of its carrying and waterfront segments and their insurers are long and presently adjusted.

One of the important aims of the 1972 Amendments was the reduction of litigation to fix economic responsibility for longshore and harborworker injury losses. This required a reading of the Act that would stabilize doctrine and make it possible to answer most legal questions involved without the aid of the courts. The *Scindia* doctrine, as applied in most of the country without an "exception" for loading stevedores, has accomplished this to a high degree, as indicated by the decline in reported controversies between vessels and waterfront employers and employees arising in third-party suits under the Act.[3] Departure from that doctrine and adoption

[2] Statistical Abstract of the United States 1993, 644, Table 1080.

[3] A rough but adequate view of the trend can be had by tallying such cases in the federal courts, annually at five-year intervals from 1971, the year before the 1972 Amendments and ten years before *Scindia*, to 1991, ten years after *Scindia, as reported in American Maritime Cases (digested under PERSONAL INJURY 1312-13149 and LONGSHOREMEN'S ACT 19)*. In 1971, there was one case in the Supreme Court and there were 20 in the courts of appeals. In 1976, when old cases were not yet all run off and the meaning of the 1972 Amendments was being widely tested, there were 12 in the courts of appeals. In 1981, the year of *Scindia*, there were two in the Supreme Court, including *Scindia*, and 12 in the courts of appeals, including remands from the Supreme Court following *Scindia*. In 1986, the limits of *Scindia* were still being explored and there were 12 cases in the courts of appeals. In 1991, there were four. The reports of district court cases declined from 37 in 1971 to 7 in 1991. It is a fair assumption that the reported court cases reflect the decline of the much larger total number of cases, most of which do not reach the reports.

of such an "exception" would reverse the trend, produce more litigation in federal courts, and increase the burden of litigation costs on the industry and its customers.

SUMMARY OF ARGUMENT

I.A. In *Scindia Steam Navigation Co. Ltd. v. De Los Santos*, 451 U.S. 156 (1981), this Court held that a shipowner's duty under the Act did not require vessel supervision or inspection of stevedores during their cargo operations. The scope of this rule extends to each instance of stevedore cargo operations, and includes the loading of cargo in a foreign as well as a domestic port.

I.B. The shipowner's general turnover duty set forth in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969) was reaffirmed in *Scindia*. This general turnover duty is an integrated standard, not subject to separate duties based upon the perceived obvious or concealed nature of a particular condition, and includes the vessel's expectation that the expert stevedore will safely and competently perform its cargo operations. Concealment is not a good criterion for shifting responsibility from stevedore to ship, since concealed conditions are revealed in the course of work, so that stevedores clearly have responsibility to deal with them, and questions arise from the time, way and extent that concealment ends and precautions become possible. It would be a great mistake of safety policy to hold that stevedores cease to bear responsibility for a condition that has once been concealed. Such a rule would be a license to relax vigilance by the party primarily responsible for em-

ployee safety and would, in addition, apply to most of the cargo discharged in the seaports of this country, destroying more than half the reach of this Court's rule in *Scindia* and producing windfall recoveries for stevedores, contrary to the allocation Congress intended.

I.C. Petitioner's argument that the turnover duty is breached when a foreign loading stevedore creates a dangerous condition in the cargo stow is based on a restricted interpretation of the central holding of *Scindia*. The limitation is not justified by the breadth of this Court's opinion and is unreasonable since it would nullify for all practical purposes the central rule of *Scindia* that a shipowner is not required to supervise or inspect the stevedore's work. Such a limitation on the *Scindia* rule would also result in vessel liability without fault, expressly abolished by the 1972 Amendments.

II.A In the *Turner* and *Riggs* cases, Ninth Circuit panels, by evading the central ruling in *Scindia* on the extent of the shipowner's duty of supervision, and concentrating on the turnover duty, with its references to reasonable care, in isolation, imposed on the shipowner a supervisory duty over cargo stowage. They have declared *Scindia* limited to its facts, and therefore concerned only with the duty to intervene in case of danger to a longshoreman loading cargo in a domestic port. Considering what this Court had before it in *Scindia*, and the breadth of its statement of the rule, that was not a fair appraisal. To make the desired use of the turnover duty, the Ninth Circuit panels bifurcated it into unrelated duties of condition and warning, so as to be able to declare that the shipowner had a duty to prevent conditions of which it explicitly did not have a duty to warn, a most implausible conclusion. They have aggravated this interpretation by interpreting the "work space" referred to in *Scindia* as including the cargo, and accomplished this by a strange interpretation of an earlier case of their own.

It was well established before *Scindia* that stevedores should suspend work at times until corrective measures were taken. This proposition was misinterpreted in the Ninth Circuit to be an assertion by the shipowner of the common law defenses of assumption of risk and contributory negligence, which are not available as against the longshoreman. It thereby confused the relationship of the vessel and the stevedore and its lack of relationship with the stevedore's employees. It also confused the concept of duty with that of defenses to performance where duty is established, and assumed that a longshoreman is without remedy where the shipowner has no affirmative duty, failing to recognize the longshoreman's liberal compensation rights and the Act's allocation of risk and loss within the industry.

II.B. The Ninth Circuit panels have falsely assumed that the shipowner can protect itself against bad stowage abroad by selection of the stevedore, or by supervising the stevedore "when necessary". These assumptions, made on no evidence at all, overlook that shipowners often have no choice of stevedores abroad, and that, to supervise them "when necessary," would be to supervise them all the time in order to learn when it was necessary. The panels have further assumed, with no evidence at all, the implausible general conclusion that foreign stevedores can be effectively sued for indemnity under their laws and tariffs. They also resort to flimsy evidence of custom, contrary to its legal definition as presumably meant by this Court in *Scindia*. The *Turner* panel desired not to leave the longshoreman "to the mercies of foreign stevedores", disregarding that the longshoreman, if he does not recover against the vessel, is not cast upon charity or chance, but has the security of liberal compensation, the cost of which is borne, as intended, by his employer.

II.C. The Longshore Act is one of many legal and contractual systems that depend in large part upon risk allocation in

advance, rather than largely upon fault-based litigation. In advancing that pattern, this Court, in *Scindia*, established a practical division of responsibility between the stevedoring segment and carrying segment of the industry. The general rule by which this was done should not be overturned to suit the facts of a particular case. To do so would frustrate the purpose of a rule of allocation by creating uncertainty and promoting litigation. The Ninth Circuit has done just that, by first carving out an exception to the rule for "concealed" hazards, justifying it by their concealment, and then holding that the same principles require spreading the exception to open and obvious hazards, ignoring that the exception had its basis in concealment. The rule Petitioner seeks would apply to most of the cargo discharged in this country and introduce great confusion of economic, as well as operational, responsibility, implicating the concern expressed in *Scindia* about windfall recoveries of stevedores through third-party suits.

III. While the fundamental rule of *Scindia* applies to loading and unloading and to all ports, that does not mean that a vessel may not have any duty with regard to a condition of cargo stowage, but such a duty will only arise if the vessel has actual knowledge of a cargo hazard it cannot expect the expert stevedore, on whom the vessel is entitled to rely, to discover and take precautions against. Absent evidence that the shipowner in this case knew of the use of the plastic under the cargo and that it presented a hazard in the face of which the discharging stevedore could not "carry on its operations with reasonable safety," the judgment below should be affirmed.

ARGUMENT

I. UNDER *SCINDIA*, A SHIPOWNER'S DUTY TO A LONGSHOREMAN EMPLOYED IN DISCHARGING CARGO DOES NOT INCLUDE SUPERVISION OR INSPECTION OF THE STEVEDORE OPERATIONS IN LOADING THE CARGO.

A. The Central Rule of *Scindia* Recognizes No Duty on the Vessel to Supervise or Inspect the Stevedore's Loading or Unloading Operations.

In *Scindia Steam Navigation Co. Ltd. v. De Los Santos*, 451 U.S. 156 (1981) this Court addressed the scope of a shipowner's duty and the standard of care owed to a longshoreman under the 1972 Amendments to the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. Section 905(b). Although this Court recognized a different vessel duty for dangerous conditions existing before the commencement of stevedore work and for conditions arising thereafter, the central issue decided was whether the shipowner had a duty to supervise or inspect the stevedore cargo operations. Relying upon earlier Supreme Court decisions and the intendments of the 1972 Act, and after considering a large number of earlier federal court decisions under the Act, this Court held that, once the stevedore's cargo operations have begun, a shipowner has:

> "no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore . . . [T]he shipowner within limits, is entitled to rely on the stevedore and owes no duty to the longshoreman to inspect or supervise the cargo operations." *Id.* at 172.

A narrow exception, not involved in this case, was recognized for dangerous conditions arising from a defect in ship's gear. If the vessel knows of the defect, and knows that the

stevedore's employees are continuing to use the defective gear despite the dangers, the ship may, under certain circumstances, have a duty to intervene. *Id.* at 175-176.

In establishing this rule, the Court recognized that to impose a continuing duty on the vessel to inspect or supervise to discover dangerous conditions would result in holding the ship solely liable for breach of a warranty of seaworthiness or other non-delegable duty, which the amended Act expressly eliminated. *Id.* at 169. Although the 1972 Amendments insulated the stevedore from indemnity liability to the vessel, the *Scindia* decision validated the principles underlying this Court's earlier decisions in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) and *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964). Thus, the 1972 amendments did not disturb the stevedore's implied warranty that it would perform its services in a workmanlike manner or the vessel's justifiable expectation that the stevedore contractor would safely and competently perform its services. 451 U.S. at 172.

This Court found reasons for not imposing a duty on the ship to supervise or inspect in the provision of the Act (33 U.S.C. § 941) which requires the stevedore to provide a reasonably safe place to work. Thus, "within limits, the shipowner may rely on the stevedore to avoid exposing the longshoreman to unreasonable hazards." *Id.* at 170.

B. The Shipowner's General Duty in Turning Over Its Vessel to the Stevedore, Set Forth in *Federal Marine Terminals v. Burnside Shipping Co.* and Reaffirmed in *Scindia*, Does Not Consist of Separate and Independent Duties of "Safe Condition" and "Warning" but Is Based on an Integrated Standard Limited in Scope by the Stevedore's Warranty of Competent and Safe Performance.

In defining the shipowner's duty to a longshoreman for vessel conditions existing before the commencement of stevedore cargo operations, this Court expressly adopted its earlier decision in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969). *Burnside* held that the vessel owes to longshoremen a duty of "due care under the circumstances", more particularly defined as follows:

> This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care, to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. *Id.* at 416 n. 18. *Scindia*, 451 U.S. at 166-7.

This turnover duty, reaffirmed in *Scindia*, was expressly based on the opinion in *Hugev v. Dampskisaktieselskabet International*, 170 F. Supp. 601, *aff'd and adopted*, 274 F. 2d 875 (9th Cir. 1960). 394 U.S. at 416 n. 18. The *Hugev* opinion analyzed the circumstances surrounding the steve-

dore's performance of services on the vessel and formulated the shipowner's duties in light of the law and those circumstances, among them the circumstance that the stevedore contractor holds itself out to be the expert in loading and unloading the cargo. As the expert, the stevedore warrants that it will perform its services in a competent, workmanlike manner and with reasonable safety to persons and property. 170 F. Supp. at 608, citing *Ryan*, 350 U.S. at 134 and *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 565 (1958). As the court recognized in *Hugev*:

> In almost every instance, when a stevedoring contractor commences the work of loading or unloading a seagoing vessel, the ship has arrived in port only a few hours before. . . . Almost always, she has ridden some heavy seas. . . . Almost surely she will have been serviced by stevedores of varying degrees of competency in other parts of the world. . . .
>
> It is reasonable to expect then that . . . she may well be a place of danger even as she docks. . . .
>
> The stevedoring contractor knows that the ship has been at sea; that she may be in many respects dangerous to the life and limb of an unskilled person; that if a condition is found which is unsafe for the professional longshoreman, as a rule the contractor can remedy it at the expense of the shipowner; that if the stevedoring operations are thereby delayed, the shipowner must normally pay for standby time.
>
> Stevedoring contractors hold themselves out as being trained and equipped to cope with these conditions and these dangers. . . . So it is that the stevedoring contractor cannot reasonably expect, and does not expect, to board a vessel which . . . [is] even in a reasonably safe condition. . . . 170 F. Supp. at 609-610.

These circumstances provide the essential foundation for defining the ship's turnover duty as this Court did. The *Burnside* duty, reaffirmed in *Scindia*, incorporates these implied-in-fact obligations of the stevedore based on his expertise, and the rightful expectation that the stevedore will properly and safely perform its work mindful of the possible dangers aboard the vessel. Thus, under *Burnside*, the vessel is not duty-bound to turn over a vessel which is, in all respects, safe. The vessel is, within limits, entitled to rely on the expertise, competency and safety of the stevedore.

This Court's restatement of the *Burnside* turnover duty in *Scindia* was limited to the physical condition of the ship, her gear, equipment and "work space to be used in the stevedoring operation." 451 U.S. at 167. Neither *Scindia* nor *Burnside* included the cargo stowage in defining the vessel's duty. This Court's reference to "work space" was logically understood by shipowners to mean the ship's decks, walkways, platforms and other structural features on or about which the longshoremen perform their work, as the Third Circuit agreed, in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490, 495 (3d Cir. 1987).

The Ninth Circuit, however, has expanded the *Burnside* turnover duty by interpreting "work space" to include the cargo stowage. *Riggs v. Scindia Steam Navigation Co., Ltd.*, 8 F.3d 1442 at 1445 n. 5 (9th Cir. 1993). The structural aspects of a ship, including her decks, walkways, platforms and cargo holds are permanent features of the ship on which stevedore's employees perform their work. Cargoes are infinite in form, size and character. The stowage of cargoes is temporary. Stowage factors will change at each port of call through the cargo operations of the stevedore. The inclusion of cargo within the ship's "work space" for purposes of the *Burnside* turnover duty is not justified as a matter of principle, since it contradicts the rule of *Scindia* that the vessel need not supervise or inspect the stevedore's operations.

The reaffirmation in *Scindia* of the *Burnside* rule has been mistakenly interpreted, most notably by the Ninth Circuit, as two separate duties. In *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1207 (9th Cir. 1989), the duty was characterized as consisting of both a "turnover duty of safe condition" and a "turnover duty to warn". Under this interpretation, a hidden danger may raise a duty to warn, while an open and obvious danger does not, but invokes the vessel's "duty of safe condition."

This treatment of the *Burnside* duty produces illogical results. The shipowner is put under a duty to correct an obvious danger for which it has no duty to warn. *Martinez v. Korea Shipping Corp.*, 903 F.2d 606 (9th Cir. 1990). An obvious danger may carry its own warning. *Ludwig v. Pan Ocean Shipping Co. Ltd.*, 941 F.2d 849, 851 (9th Cir. 1991). The obvious condition may not, however, be susceptible to a ready correction, as in *Riggs v. Scindia Steam Navigation Company*, 8 F. 3d 1442 (9 Cir. 1993), where the steel pipe stow was said to be in obvious disarray. The result in *Martinez* and *Riggs* is vessel liability for what actually represents the functional equivalent of unseaworthiness liability prohibited by the 1972 Amendments.

Properly read, the *Burnside* rule is not two separate duties. The rule is to be read altogether. The reference in *Burnside* and *Scindia* to a duty to warn, when read with the *Hugev* opinion, is simply a recognition of circumstances under which a warning by the vessel is required and sufficient in place of preventing or remedying the condition.

In this case, where the evidence does not indicate a warning by the ship, the criterion under the two-duty rule, as proposed by Petitioner, is whether the use of plastic sheeting represented a "hidden" or "obvious" condition, without regard to the expectation that the stevedore could cope with it. This approach misses the point. The fundamental question is whether, under the statutory allocation of risks, the

ship can rely on the expert stevedore to discharge the cargo with reasonable safety. The duty of the stevedore contractor is not limited to the handling of the cargo but includes the duty to suspend work and avoid injury to their employees whenever it would be unsafe to proceed. *Hugev*, 170 F. Supp. at 608, 610 and cases cited.

Concealment as the criterion for shifting responsibility from stevedore to ship opens a spectrum of uncertainties. Certainly a stevedore who actually discovers, in the course of work, a potential hazard that was earlier concealed, has defined responsibilities for it. Short of that, there are questions of risk allocation which, if opened wide, will provide a fruitful field of litigation of subjective issues that have been largely foreclosed since the 1972 Amendments, and risk the imposition of liability without fault on the vessel. It would be a great mistake of safety policy to tell stevedores they need not exercise keen vigilance for unseen dangers and to reimburse them for the consequences. Then, indeed, such a "rule of shipowner liability will skew the statutory scheme in a way Congress could not have intended." *Scindia*, 451 U.S. at 181 n. 2 (Powell, J. and Rehnquist, J., concurring).[4]

The turnover duty of *Burnside*, read together with *Scindia*'s rule placing no duty on the ship to inspect or supervise the work, substantially parallels the settled principles of land-based law expressed in the Restatement (Second) of the Law of Torts, §§ 343 and 343A. Although this Court noted in *Scindia* that these sections "while not irrele-

[4] The concurring opinion in *Scindia* by Justice Powell, with the concurrence of Justice Rehnquist, as he then was, aptly points out the dangers stemming from a failure to articulate a vessel standard of care which allocates responsibility between the shipowner and stevedore. Negligent stevedores will receive windfall recoveries of statutory compensation benefits and the shipowner will be held responsible for all damages. This removes the incentive of the stevedore to provide a safe work environment. 451 U.S. at 181.

vant, do not furnish sure guidance in cases such as this", Amicus submits that, in particularizing the shipowner's duty in relation to stevedoring, the "sure[er]" guidance was achieved. 451 U.S. at 168 n. 14. See concurring opinion by Justice Powell interpreting the Court's ruling as consistent with these Restatement standards. *Id.* at 180 n. 1.

C. *Scindia*'s Principal Rule Extends to Each Cargo Operation During the Voyage and Otherwise Would Have No Practical Meaning.

Petitioner's argument is based upon a highly restricted interpretation of *Scindia*. Petitioner contends that the principal teaching of *Scindia* — that a shipowner has no duty to supervise or inspect for dangerous conditions arising during stevedore cargo operations — is limited to circumstances where the stevedore-employer has commenced cargo operations. With this limitation read into *Scindia*, Petitioner argues that a shipowner has a heavier burden, including the duty to supervise and inspect during stevedore loading, in a foreign port, a failure of which risks vessel liability to an off-loading longshoreman. Petitioner finds support for his narrow reading of the *Scindia* rule in decisions of the Ninth Circuit. *See Riggs v. Scindia Steam Navigation Co.*, 8 F.3d 1442 (9th Cir. 1993).

Amicus submits that this Court's decision in *Scindia* was not intended to be so limited and cannot reasonably be so read. When this Court decided *Scindia,* it considered an abundance of lower federal court decisions presenting various interpretations and qualifications of the nature and scope of a vessel's duty under the 1972 Amendments. (See 451 U.S. at 163 nn. 9, 21, 25, identifying some of them). This Court rejected those decisions, at least in part, as inappropriate or inconsistent with the intent of the Act. This Court expressly rejected, as inconsistent with the Act, the argument that a "shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process." 451 U.S. at 169. Had this Court intended to restrict its holding, it would have so stated.

Petitioner's argument would produce the anomalous and unintended result that a shipowner is burdened with a duty vastly more extensive simply because the loading stevedore was foreign. Petitioner's interpretation of *Scindia* is unreasonable since it would, when fully comprehended, nullify the essential rule of *Scindia*. Vessels calling at United States ports are carrying cargoes which, almost always, have been loaded at several foreign ports. Cargo loaded in one foreign port may have been discharged at another foreign port, or at a preceding United States port. At each such intermediate port of call, the vessel's cargo will have been loaded and discharged by stevedores and the stowage will have been altered.

Petitioner's view would require a constant duty on the shipowner to supervise and inspect each loading and discharging stevedore's work at each port of call, including any intermediate foreign or United States ports, to ensure that it had not created a potentially hazardous condition for the longshoremen at the next domestic port. Extending Petitioner's logic to its natural conclusion would require the vessel to supervise and inspect during the cargo discharge by this Petitioner's employer to ensure that its work did not create a potential hazard for longshoremen at the next port. That surely is not what this Court meant when it unequivocally held that a vessel has no general duty to inspect or supervise the activities of the loading or unloading stevedore. Petitioner's argument would impose the very duty on the vessel which this Court rejected in *Scindia*.

II. THE NINTH CIRCUIT OPINIONS IN *TURNER* AND *RIGGS* REPRESENT AN EFFORT TO UNDERMINE THE RULING IN *SCINDIA*.

The conflict that brings this case here is produced by two cases in the Ninth Circuit, and perhaps one in the Fifth, where the extent of conflict is unclear.[5] The Ninth Circuit cases differ not only with the Second and the Third, but directly with *Scindia* itself, with which it professes to be reconciled by an imaginative view that this Court did not really mean what it said there.

In *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), the court upheld a jury verdict for a discharging longshoreman injured when cargo loaded abroad collapsed for lack of support beneath it, a condition that could not be seen at the time of the accident. The holding was based on a perceived duty to prevent the condition by supervising the loading stevedore. 651 F.2d at 1303. The decision was reached by limiting *Scindia* to its facts, bifurcating the turnover duty, crediting a claimed "custom" of supervision,

[5] *Woods v. Sammisa Co.*, 873 F.2d 842 (5th Cir. 1989), where the court was constrained to follow its earlier case, *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), will not be discussed at length here because the Fifth Circuit position is significantly different from that of the Ninth. It is less radical in one respect and possibly more so in another. It does not appear to impose a duty of supervision and inspection on the shipowner. The Fifth Circuit has gone no further in these cases than to raise a duty in the event of actual knowledge. *Woods*, 873 F.2d at 848; *Lemon*, 656 F.2d at 116. In *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299 n. 2 (5th Cir. 1984), the court also indicated that evidence of loading by an independent contractor rather than the shipowner would have made a difference. These cases do not present statements equivalent to those found in the Ninth Circuit cases. They make no point of foreign loading and, in *Lemon*, the origin of the cargo is not even mentioned. The Fifth Circuit doctrine therefore appears to apply to domestic cargoes. Thus the Ninth Circuit's claim in *Riggs* (8 F.3d at 1448) that it was joining in the doctrine of the Fifth was incorrect.

stressing the concealed character of the defect, making several unfounded assumptions, and concluding that the shipowner was not protected as to the work of foreign stevedores who were not under the Act.

In *Riggs v. Scindia Steam Navigation Co.*, 8 F.3d 1442 (9th Cir. 19[illegible]), No. 93-1293 in this Court on Petition for Certiorari, the defect in the cargo loaded abroad was open and obvious. The court, disregarding its earlier reliance on concealment, held that there was no difference in principle, and liability of the shipowner was required by *Turner*, together with a later case having nothing to do with cargo operations.[6]

Both decisions were inconsistent with *Scindia*, and even with each other, in several respects. And it was not true, as the court claimed in *Riggs*, 8 F.3d at 1448, that it had the company of the Fifth Circuit in its holding.[7]

A. The Ninth Circuit Ignores the Holding of *Scindia* and Reads that Case Only to its Own Purposes.

In both *Turner* and *Riggs*, the panels ignored the fact that the central issue in *Scindia* was the general extent of the shipowner's duty of supervision of stevedores.[8] This Court's decision of that issue was that there was no such general duty. 451 U.S. at 172. The Court reviewed related duty issues to place this central ruling in a setting for the

[6] *Martinez v. Korea Shipping Corp., Ltd.*, 903 F.2d 606 (9th Cir. 1990) (vessel equipment condition at time of discharge).

[7] *See* note 5 *supra*.

[8] "The question presented is whether a shipowner's duty of care to longshoremen under the 1972 Amendments to the Longshoremen's and Harbor Workers' Act, 33 U.S.C. section 905(b) requires it to supervise the work of an expert independent stevedore contractor so closely as to be in a position to countermand the stevedore's informed decision regarding the safety of work methods and equipment." Petitioner's Brief in No. 79-512.

guidance of the lower courts, in which there were then many cases on such issues.

The authors of both the *Turner* and *Riggs* opinions cited *Scindia* and evaded it, not confronting its central ruling squarely, but treating it as though it were collateral or incidental. Indeed, in both cases, the evasion extends to stating the intervention rule, rather than the supervision rule to which it is an exception, as the rule of *Scindia*. 651 F.2d at 1303; 8 F.3d at 1446 n. 9. Thus freed of the *Scindia* supervision rule, the court focused instead on the statement of the turnover duty from *Federal Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404, 416 n. 18 (1969). By reading the turnover rule without the *Scindia* ruling on supervision, the references to reasonable care in the turnover rule could be moulded to impose a supervisory duty on the shipowner.

The author of *Turner* delicately acknowledged finding "one decision apparently adopting [a contrary] view." 651 F.2d at 1303. *Ruffino*,[9] the case cited, had done so, not apparently, but clearly and unequivocally. Without extravagant generosity, *Scindia* could also have been mentioned as stating, at least "apparently," a contrary view.

Turner implicitly limited *Scindia* to its facts. 651 F.2d at 1303. *Riggs* did so explicitly. 8 F.3d at 1446. This Court had before it in *Scindia* more than two dozen cases from seven circuits interpreting the scope of the shipowner's duty under the 1972 Amendments, including *Ruffino*, and presenting a wide variety of loading and discharging situations,[10] of which the Court cited a number. No fair reading of *Scindia*, canvassing the subject as it did, could leave the impression

[9] *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977).

[10] Petitioner's Brief in No. 79-512, pp. 18-19 n. 27-29.

that the general rule of business conduct laid down in that case was limited to a discrete fact situation and subject to an exception broader than its remaining application.

The *Riggs* opinion also made explicit, what was implicit in *Turner*, that it would bifurcate the turnover duty of *Federal Marine Terminals*, reiterated in *Scindia*, into unrelated duties of condition and warning: "[*Scindia*] expressly limits the duty to warn to hidden defects but does not place a similar restriction on the duty of safe condition." 8 F.3d at 1448 n. 12. We have explained above why this view misunderstands the turnover duty. The author's result-oriented attitude toward that duty finds expression in unqualified references to the "duty of safe condition," coming to a focus in respectful citation of the flat description of *Turner* in another Ninth Circuit case "as setting forth a vessel's duty 'to make the ship safe for longshoremen before turning the ship over to the stevedore.'" 8 F.3d at 1445. The opinion concludes that "a vessel has a duty to take the necessary steps to protect longshoreworkers against open and obvious cargo defects and not just concealed ones," and, in a footnote to this statement, recognizes only the exception that the defect may not present "an unreasonable danger." 8 F.3d at 1448. This view conflicts with the ruling of this Court that there is no duty to provide a safe place to work, apart from fault,[11] and with the consistent recognition in *Scindia* that the 1972 Amendments rejected "[c]ases holding the vessel liable on the ground that it owed nondelegable duties to protect the longshoremen from injury." 451 U.S. at 168.

The *Riggs* court aggravated its interpretation of the turnover duty by concluding that "work space to be used in the stevedoring operations," (*Scindia*, 451 U.S. at 167) includes the cargo. 8 F.3d at 1445 n. 5. We need not urge a rule

[11] *West v. United States*, 361 U.S. 118, 122-23 (1959).

excluding cargoes from "work space" in all circumstances, but a general rule of inclusion requires supervision of independent contractors to a degree that inherently violates the principle of *Scindia* and the settled principles of terrene law generally expressed in Restatement (Second) of the Law of Torts, §§ 343, 343A, and 409 (1965).

The way the *Riggs* court reached its conclusion about "work space" strikingly illustrates the tendentiousness of its opinion. It relied on *Taylor v. Moram Agencies,* 739 F.2d 1384, 1386 (9th Cir. 1984) where it had affirmed the district court's finding that the cargo stowage had in fact been safe, and actually said: "[t]he scope of the shipowner's duty as set forth in *Scindia* focuses on the character of the ship and its equipment—not on the nature of the cargo." With stunning illogic, the court now says that *Taylor* stood for the inclusion of cargo in the "work space" responsibility of the shipowner because, otherwise, it would not simply have agreed with the facts found below but would have taken an alternative ground of decision that there was no duty! 8 F.3d at 1447.

Scindia was decided against a background of understanding that stevedores could suspend work at times until corrective measures were decided and taken, *Hugev,* 170 F. Supp. at 608, 610, as implied in references to the stevedore's responsibility for avoiding hazards and providing safeguards. *E.g.,* 451 U.S. at 170. The author of *Riggs* adopted the erroneous premise that the shipowner had a relationship with the individual longshoremen, rather than their stevedore employer, as a basis for arguing that the right to stop operations until appropriate precautions are taken involves the defenses of assumption or risk and contributory negligence and is therefore irrelevant. 8 F.3d at 1448. What apparently troubled the court is the difference between known or obvious danger, as a question of a shipowner's duty, and as a basis for comparative negligence. If there is

no duty in respect of known or obvious conditions, there is no basis of possible liability, while comparative negligence would merely reduce the recovery. When the known or obvious condition is involved in the issue of duty, it only superficially resembles the common law doctrines of assumption of the risk and contributory negligence. Where the shipowner does not have the responsibility for the condition, the longshoreman is not left without a recovery, since he enjoys liberal compensation benefits from his employer under the amended Act.

Thus two panels in the Ninth Circuit have sought to carve out a huge "exception" for cargoes loaded in foreign ports. But this Court, in holding that a shipowner is entitled to rely on the stevedore's performing competently, never so much as suggested a chauvinistic limitation of such reliance to American stevedores. 451 U.S. at 171. In *Riggs* the court said it expressed no opinion as to loading by domestic stevedores. 8 F.3d at 1445 n. 6. Had the *Riggs* court considered that issue, it would have been faced with a more serious problem in trying to reconcile its views with *Scindia.*

B. The Ninth Circuit Panels Have Relied on Unfounded Assumptions of Fact and Law, Omissions and Other Fallacies.

In rationalizing the impact of its decision on the shipowner, the *Turner* court says that "[t]he vessel, on the other hand, can ensure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore." 651 F.2d at 1304. The court repeated this in *Riggs* (8 F.3d at 1446) and both cases state the further assumption that the shipowner can sue the foreign stevedore for indemnity and thereby motivate it to

safety.[12] It is a wholly unwarranted assumption that the shipowner has a discriminating choice of foreign stevedores; it is unsupported by even a suggestion of fact and takes no account of those ports abroad (as in the United States) where there is only one stevedore, and especially of those where that one is the state, municipality or port authority with a monopoly of the business. To supervise "when necessary" is to know when it is "necessary " and cloaks in bland terms either an assumption of the shipowner's omniscience or a burden of continual and close supervision. And the same is true of the supposed opportunity of warning, which requires knowing, of all dangerous conditions created by the foreign stevedore. As for suits against foreign stevedores, no authority is cited and it requires a great leap of faith to believe that they (especially the public entities) can be sued for indemnity at all in many foreign countries and that their laws and public tariffs include the equivalent of *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

This Court said that the basic law that the shipowner had no general duty of supervision could be varied by "custom to the contrary." 451 U.S. at 172. In *Turner* the court found sufficient evidence of such a contrary custom in vaguely described testimony of a "custom in the industry" of oversight, albeit for different purposes than longshore safety. It thereby read this Court, in referring to custom, to mean

[12] The *Turner* court appears to point to foreign stevedores as targets of suits because they do not enjoy the protection of the Act and the favor of Congress, in contradistinction to the American stevedores intended to be protected from indemnity. 651 F.2d at 1304. This notion was fallacious since the law does not specially protect a negligent American loading stevedore that is not the employer of the injured longshoreman. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). Thus no real distinction can be made between shifting the burden to foreign loading stevedores who are not protected by the Act, and to domestic loading stevedores that the court assumes to be protected by it, but are not.

something less than what the law regards as custom, and particularly custom clear enough to override a clear rule of law.[13] The "custom" of inspection, having been found in the one case, was considered unnecessary to be shown again in *Riggs*. With such a view of custom, the basic rule can be overridden in almost any case by a statement, without regard to location, condition and motives, that oversight is commonly practiced for the protection of cargo or ship from certain kinds of damage.

The motivation of the *Turner* court is summed up in its statement that Congress could not have "meant to leave the longshoreman to the mercies of foreign stevedores against which he may have no rights or, at least, no practical remedy." 651 F.2d at 1304. The longshoreman was not left "to the mercies of foreign stevedores," but was the beneficiary of a most liberal compensation system as a result of the

[13] Custom is not a mere practice followed by some people, or by all people sometimes, or for a private purpose. It is a "usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates." *Blacks Law Dictionary* 385 (6th ed. 1990); *accord*, 21A *Am. Jur.2d*, CUSTOMS & USAGES § 1; 25 *C.J.S.* CUSTOMS & USAGES § 2. It "must, in order to be valid, be ancient, reasonable, and generally known . . . and also be certain . . ." *United States v. Buchanan*, 49 U.S. (8 How.) 83, 102 (1850). "[C]ertainly a custom relied upon to take the place of a settled principle of law, and therefore to have the force of law, ought to be as definite and specific in negativing the principle as the law which it assumes to supplant is in affirming it." *Federal Reserve Bank v. Malloy*, 264 U.S. 160, 171 (1924). The witness who proves it must show a foundation of knowledge of the existence of its elements, that is, not only its nature but its antiquity, its geographical or trade scope, the fact that it is generally known, the fact that it is uniformly practiced and the fact that it is regarded as obligatory. *See Oelricks v. Ford*, 64 U.S. (23 How.) 49 (1860).

1972 Amendments,[14] and the contest was, in economic reality, about whether the employer or the shipowner would support that compensation.

C. The Ninth Circuit Panels Have Improperly Formulated a General Rule on the Circumstances of an Individual Case Without Regard for its Impact and Practicality or for Sound Social Rulemaking.

There are no perfect rules for allocating burdens according to fault. Good legal and social policy recognizes that a fault-based system is not a satisfactory way of distributing casualty costs within an industry. This is recognized in elaborate cross-indemnity provisions by which employers contract with each other (especially in the petroleum industry)[15] to carry the costs of their own employees' injuries, regardless of faults. We see it mainly in workers' compensation laws, where the employer's normal burden is modified on the basis of fault through third-party suits but insulation from liability is provided for other entities involved in the same job or enterprise. The Longshore Act is an example of just such a scheme, placing the burden on the employer as the norm and permitting it to be shifted on the basis of fault, according to rules framed to provide practical industry guidance, easy recognition of responsibility and a minimum of litigation. The Act, as read by this Court in *Scindia*, makes the most practical division of responsibility between

[14] Apart from medical coverage, the Act provides for weekly compensation at ⅔ of a worker's average annual wage, not exceeding 200% of the average annual weekly wage. 33 U.S.C. § 906, 908. This maximum was expected to enable about 90% of the work force covered by the Act to receive fully ⅔ of their average weekly wage. Sen. Rep. No. 92-1125, 92d Cong., 2d Sess. The maximum, obviously reached in areas of high wages, is reported, as of October 1, 1993, to be $738.30. It is tax-free under 26 U.S.C. § 104(a)(1).

[15] *See, e.g., Hyde v. Chevron U.S.A., Inc.*, 697 F.2d 614, 633-35 (5th Cir. 1983).

the stevedoring segment and the carrying segment of the industry.

In *Scindia*, Justice Powell, joined by Justice Rehnquist, stressed the importance of avoiding rules under which "negligent stevedores would be receiving windfall recoveries in the form of reimbursement for the statutory benefit payments made to the injured longshoremen (footnote omitted)." 451 U.S. at 181. In *Turner*, the court stated that this view had "no relevance to the case before us," because the discharging stevedore "could not have prevented this accident by any exercise of care," by which it referred to the fact that the defect was absolutely concealed from those working over it. 651 F.2d at 1304. In *Riggs*, the court ignored that factor, blandly cited the other grounds of the *Turner* decision, and stated that they all were equally applicable to an obvious defect. 8 F.3d at 1447. It is bad enough to make a general rule on the peculiar facts of a case, without escalating it by denying the relevance of the fact that gave rise to it. If the concern of Justices Powell and Rehnquist had indeed no relevance in a case where the defect was concealed, that ceased to be so when the defect became obvious in *Riggs*.

In reality, however, the concern of the Justices was not irrelevant to the rule the *Turner* court was laying down. While the stevedore might not be expected to guard against the hazard in *Turner*, it is certainly not shown to be true that the care and vigilance of stevedores does not prevent injury in many cases from hazards that are concealed until they are disclosed as work progresses. Such hazards include gaps in lower layers of cargo, slippery decks, loosened boards or beams, unstable stacks and broken bands or packages. Reported cases afford illustrations of these and others that can be effectively countered by careful attention to surroundings, care in walking, laying of dunnage, temporary

shoring and so on.[16] All these hazards, though concealed at an early stage, lie within the range of those to be anticipated by the stevedore and described in *Hugev* as the premise on which this Court's turnover rule was formulated.

The rule for which Petitioner argues, and which the Ninth Circuit panels have by verbalism developed and extrapolated from concealment to obviousness, would apply to almost all the cargo discharged in the seaports of this country and seriously implicate the expressed concern of Justices Powell and Rehnquist about the windfall recoveries of stevedores in cases like this.

III. THE DECISION BELOW IS CONSISTENT WITH *SCINDIA* AND THE 1972 AMENDMENTS SINCE IT PLACES PRIMARY RESPONSIBILITY FOR SAFETY IN CARGO OPERATIONS ON THE STEVEDORE.

The premises on which we urge the Court to found its decision are these.

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[16] In the reported cases, conditions that were concealed until revealed in the course of operations appeared more frequently before the abolition in 1972 of the warranty of seaworthiness and stevedore indemnity. *See, e.g., Nuzzo v. Rederi A/S Wallenco*, 304 F.2d 506 (2d Cir. 1962) (holes in underlying cargo layers to be anticipated); *Hugev v. Dampskisaktieselkabet International*, 170 F. Supp. 601, 609-10 (S.D. Cal. 1959), *aff'd and adopted*, 274 F.2d 875 (9th Cir. 1960) (misplaced queen beam and unstable hatch boards under foreign cargo); *Amerocean S.S. Co. v. Copp*, 245 F.2d 291 (9th Cir. 1957) (non-apparent slippery condition of oiled deck); *American President Lines v. Marine Terminals Corp.*, 234 F.2d 753 (9th Cir. 1956) (absence of beam lock visible after partial discharge); *Borm v. Cunard S.S. Co.*, 367 F. Supp. 389 (S.D. Tex. 1973) (lack of locking pin in rail stanchion a latent defect brought into play by negligent stevedore operations); *Williams v. Lehigh Valley R.R. Co.*, 151 F. Supp. 809 (S.D. N.Y. 1957) (bad dunnage and poor illumination).

The scope of the turnover duty necessarily incorporates the rule of *Scindia*. It is a single, unified standard, not varying in nature by the obvious or concealed character of the condition, and is limited by the ship's rightful expectation that a stevedore contractor, as the party in general best positioned to do so, will discover, and avoid or correct, potential hazards in cargo stowage conditions as well as the condition of the ship and her equipment.

Under *Scindia*, the shipowner has no general duty to supervise or inspect the loading stevedore's operations, and it would be unreasonable to expect it, in turning over its vessel to a discharging stevedore, to represent that the cargo stow is free of potential hazards. Imposing a vessel duty to inspect or supervise in a foreign port would eviscerate the essential rule of *Scindia* and impose liability on a shipowner for stevedore fault, contrary to the intent of the 1972 Amendments.

This is not to say, however, that a vessel may have no duty at all with regard to a pre-existing condition in the cargo stow. Circumstances may arise, however exceptional, where a vessel has actual knowledge of a serious cargo stow hazard which it cannot expect an expert stevedore, with vigilance and attention to the possibility of concealed dangers, to discover and guard against. Under such circumstances, the ship's duty, despite the rule of *Scindia*, may require the vessel to act. Absent such circumstances, the *Scindia* rule allocates responsibility and risk to the stevedore to discover, avoid and, where practicable, correct hazardous conditions in the cargo stow. Failure to do so does not leave the injured longshoreman without a remedy, since he enjoys the benefit of liberal compensation payments.

Applying these legal principles to Petitioner's case mandates affirmance of the decision below. Certainly, in the absence of evidence that the shipowner knew of the use of plastic on the deck under the cargo, and knew that this

common material presented a hazard in the face of which the discharging stevedore could not "carry on its cargo operations with reasonable safety," the judgment should be affirmed.

CONCLUSION

For the foregoing reasons, we submit that the Court should affirm the judgment below and, in doing so, reaffirm the breadth of *Scindia*, which, since it was handed down, has greatly clarified responsibilities of ships and stevedores for the compensation of injuries and greatly reduced litigation in the courts to fix that responsibility.

Respectfully submitted,

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